IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-757

CUMMINS ENGINE COMPANY, INC.,
Petitioner,

vs.

ALAN CARNEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Cummins Engine Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 17, 1979.

OPINION BELOW.

The opinion of the Court of Appeals, reported at 602 F. 2d 763 (7th Cir. 1979) appears in the Appendix hereto. The opinion of the District Court, reported at 84 CCH Lab. Cas. ¶ 10,856, 99 LRRM 2683 (S. D. Ind. 1978) is also reproduced in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1979. A timely petition for rehearing and suggestion for rehearing en banc was denied on August 16, 1979, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether 38 U. S. C. § 2021(b)(3) guarantees to reservists incidents and advantages of employment arising during their absences for duty when this Court's decisions do not guarantee those same incidents and advantages to veterans.

2. If so, whether 38 U. S. C. § 2021(b)(3), as applied, violates the Fifth Amendment prohibition against taking without just compensation.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

(Due to the length of the statutory provisions involved they are set out in full in the Appendix hereto.)

Amendment V, United States Constitution.

United States Code, Title 38:

§ 2021. Right to reemployment of inducted persons; benefits protected.

§ 2022. Enforcement procedures.

§ 2024(d.) Rights of persons who enlist or are called to active duty; Reserves.

§ 2025. Assistance in obtaining reemployment.

STATEMENT OF THE CASE.

The respondent, Alan Carney, a member of the National Guard, was first employed by petitioner Cummins Engine Company (hereinafter "Cummins") on October 15, 1968. On August 26, 1974, he was assigned to the job of Engine Assembler. He remained on that job until September 2, 1975, at which time he transferred to another department. (Appendix, p. 8.)

Respondent is a member of the Diesel Workers' Union (hereinafter "Union") and the terms and conditions of his employment are and have been governed by the provisions of the then applicable collective bargaining agreement between Cummins and the Union. (Appendix, p. 8.)

During the negotiations between Cummins and the Union for the 1972-1975 Collective Bargaining Agreement, a provision was inserted into the Agreement for the purpose of preventing discrimination by Cummins in assigning overtime to employees who were present, had made themselves available and who were qualified to perform the overtime in question. This provision was incorporated into the 1972-1975 Agreement as Appendix I, § 2. (Appendix, pp. 8-9.) This provision did not require or intend to equalize overtime actually worked or overtime pay received by employees. Cummins only agreed that overtime opportunities would be distributed in a non-discriminatory manner among employees present, available and qualified to perform the work and that the differential between the employee in a department with the most overtime opportunities and the employee with the least opportunities would have to be kept within the limits specified in Appendix I, § 2 of the Agreement. (Paragraph 3

of Kevin E. Sheehan Affidavit [hereinafter Sheehan Affidavit], Appendix, p. 21.)

Under the terms of the 1972-1975 Agreement, if Cummins erred in the assignment of overtime, either intentionally or through inadvertence, and the differential exceeded the specified limits, Cummins was required to correct such error within 30 days of the time the error was brought to its attention or pay that portion of the overtime that was "out of limits." (Appendix I, § 20, Appendix, p. 29.) In addition, if an employee transferred from the department before the out-of-limits overtime had been made up, Appendix I, § 20 of the Agreement required that Cummins pay for the out-of-limits overtime notwithstanding the fact that the 30-day correction period had not yet passed. (Paragraph 3 of the Sheehan Affidavit, Appendix, p. 21.)

The aforementioned provisions of the 1972-1975 Agreement were carried over into the 1975-1978 Collective Bargaining Agreement between Cummins and the Union. Appendix I, § 2 of the 1972-1975 Agreement became Appendix I, § 2 of the 1975-1978 Agreement. (Appendix, p. 30.) Appendix I, § 20 of the 1972-1975 Agreement becoming Appendix I, § 29 of the 1975-1978 Agreement. (Appendix, p. 33.) (Paragraph 4 of the Sheehan Affidavit, Appendix, p. 22.)

Only two situations exist under the overtime distribution provisions of the Agreement where Cummins is obligated to pay an employee for overtime not actually worked. These arise when Cummins intentionally or through inadvertence fails to offer overtime opportunities to an employee present, available and qualified to perform them to the extent that an out-of-limits situation occurs and Cummins either (1) fails to make up the opportunities within 30 days after the error is brought to its attention, or (2) the employee transfers to a new department before the 30-day make-up time has expired. In either case Cummins must err in assigning overtime before an employee can demand payment for such time not worked. (Paragraph 6 of the Sheehan Affidavit, Appendix, p. 23.)

On or about July 9, 1975, Cummins received a letter from a Resident Compliance Officer for the U. S. Department of Labor. That letter advised Cummins that it was the Department's position that Cummins' policy of charging an employee absent by virtue of his National Guard commitment with any overtime opportunities which he would have been offered if present and available was contrary to Federal law. A copy of a decision entitled *Richard A. Lott* v. *Goodyear Aerospace Corporation,* 395 F. Supp. 866 (N. D. Ohio E. D. 1975), was submitted in support of this position. (Paragraph 7 of the Sheehan Affidavit, Appendix, p. 24.)

Following receipt of that letter, Kevin Sheehan, on behalf of Cummins, met with representatives of the Union to discuss the issue. At that meeting Sheehan informed the Union that if the Union was agreeable to modifying the overtime procedures Cummins would also be agreeable, so long as it was understood that any overtime opportunities missed as a result of an employee's National Guard commitments would not result in an out-of-limits situation subject to payment under the terms of Appendix I, § 29 of the 1975-1978 Agreement since such missed opportunities would not be due to any error by Cummins in offering overtime to present, available and qualified employees. The Union indicated that it was agreeable to such a change and accordingly a formal agreement to that effect was adopted (Exhibit D, attached to the Sheehan Affidavit, Appendix, p. 34.)

Under the overtime provisions of the Agreement as modified, employees who are absent due to military obligations when an overtime opportunity exists which they would otherwise be offered are not charged as if they had worked such overtime. Rather, such employees are marked as having been absent due to military obligations and are entitled to make up such missed overtime opportunities in the future so long as they remain in the department where they worked when the opportunities arose. Hence, these employees are treated more favorably than all other

employees since an employee absent for *any other reason* be it personal or civic (*e.g.*, jury duty), may not make up the missed overtime opportunities because he is charged as if he had worked them. In fact, the modified Agreement, by allowing such make-up of missed overtime opportunities, *assumes* that the employee absent for military reasons would have accepted the overtime assignment. (Paragraph 8 of the Sheehan Affidavit, Appendix, p. 24.) However, the modified Agreement does not require Cummins to pay an employee for such missed overtime opportunities under Appendix I, § 29, since such overtime opportunities were not missed due to any error by Cummins. (Paragraph 10 of the Sheehan Affidavit, Appendix, p. 26.)

On or about October 8, 1975, Cummins received a letter from the Area Director of the U. S. Department of Labor in Chicago. In that letter, Cummins was advised that the respondent was contending that he was entitled to payment for overtime opportunities missed while attending summer camp with the Indiana National Guard since he had transferred to another department before being allowed to make up all of the overtime opportunities missed. (Paragraph 9 of the Sheehan Affidavit, Appendix, p. 25.)

On February 4, 1974, Cummins was advised that it was respondent's contention that Cummins was obligated by Federal law to pay respondent for the overtime opportunities he had accumulated due to his military obligations when respondent transferred departments. As a result of Cummins' continued position that its policies do not violate Federal law, suit was brought in the Southern District of Indiana based upon 38 U. S. C. § 2022. The District Court rendered judgment in favor of respondent which was affirmed by the Court of Appeals, whose jurisdiction was invoked under 28 U. S. C. § 1291.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT BY GIVING RESERVISTS RIGHTS NOT PROTECTED BY THIS COURT'S DECISIONS CONCERNING VETERANS AND BY RENDERING THE CONTROLLING STATUTORY SECTION REGARDING RESERVISTS MEANINGLESS AND WITHOUT EFFECT.

Section 2024(d) of the Veterans Reemployment Rights Act, 38 U. S. C. § 2021 et seq., provides that upon request a reservist shall be granted a leave of absence for reserve duty and that upon his release from such duty he "shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." This provision is virtually identical with the language of the provisions of § 2021(a)(A)(i) and (a)(B)(i) of the Act—provisions which govern the return of veterans and which have been consistently interpreted by this Court to require an employer to guarantee to veterans only those benefits which would accrue to them solely by reason of continued employment, *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275 (1945); *Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975); and not to require a perfect reproduction of the civilian employment that might have existed. *McKinney* v. *Missouri-Kansas-Texas Railroad*, 357 U. S. 265, 271 (1958).[1]

1. Since Cummins' obligation under the applicable collective bargaining agreement not to discriminate among those present, available and qualified to perform the work has no relationship to the length of service, job classification or rate of pay of any employee or group of employees, but applies equally to all its employees, Carney could not and did not argue that Cummins' obligation to its employees constitutes "seniority, status, [or] pay." Accordingly, cases such as

(Footnote continued on next page.)

Notwithstanding this Court's settled construction of the provisions governing veterans, the decision below construed the Act to require an employer to perfectly reproduce the incidents or advantages of employment occurring during a Reservist's absence. 602 F. 2d at 765, 766 (Note 2), 767 (Note 4); Appendix pp. 4-5, 7). The Circuit Court justified this conflict with this Court's decisions regarding veterans and the imposition of this obligation to reproduce such incidents or advantages of employment by relying on 38 U. S. C. § 2021(b)(3), which provides:

> "Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

The Circuit Court held that § 2021(b)(3) was added to the Act to protect rights found to be inadequately protected under § 2024(d) and applied § 2021(b)(3) to the period of the respondent's absence rather than § 2024(d)—the provision which explicitly applies to that period of time.

The Circuit Court, in holding that the overtime opportunities which occurred during the respondent's absence were protected by Section 2021(b)(3) and that Cummins was required to take affirmative action to duplicate that incident or advantage, conceded that it was giving reservists more protection than this Court's decisions grant to veterans. 602 F. 2d at 766, App. 6. It rationalized that result by attributing that intent to Congress.

(Footnote continued from preceding page.)

Tilton v. *Missouri P. R. Co.*, 376 U. S. 169 (1964), which recognize that in certain instances (*e.g.*, seniority status dependent on a probationary work period) a veteran may be treated as if he had been at work, do not apply. Instead, the mode of analysis is that given with respect to "other benefits." *Hoffman* v. *Bethlehem Steel Corp.*, 477 F. 2d 860, 862-863 (3d Cir. 1973). Thus, the reservist would be treated as if on "leave of absence" with respect to benefits arising during his absence.

In holding that Congress intended to give reservists rights which are not given to veterans, the decision below relied only on the language of Section 2021(b)(3) of the Act and ignored both § 2024(d) and the legislative history behind the Act. This was error since the Legislative History (Appendix 35-80) of what is now Section 2024(d) and that of Section 2021(b)(3) shows that it was the intent of Congress to give reservists and National Guardsmen the *same* reemployment rights as veterans[2] and that Section 2021(b)(3) was added in 1968 to protect reservists and National Guardsmen from discrimination by their employers *between their reserve absences* based on Congressional recognition that protection from discharge for a fixed period of time was impractical.[3] Moreover, since "seniority, status, pay and vacation" are also undeniably "incidents or advantages" of employment, the Seventh Circuit's application of § 2021(b)(3) to the period of a reservist's absence renders § 2024(d) entirely meaningless, thereby conflicting with this Court's commands as to the proper construction of the Act. *Fishgold, supra* at 285. Cf. *Kokoszka* v. *Belford*, 417 U. S. 642, 652 (1974); *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975); *Jarecki* v. *G. D. Searle Co.*, 367 U. S. 303 (1961); *MacEvoy* v. *United States*, 322 U. S. 102, 107 (1944).[4]

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2. 1951 U. S. Cong. & Admin. News 1502; 1955 U. S. Cong. & Admin. News 2816; 1960 U. S. Cong. & Admin. News 3077-3078.

3. 1968 U. S. Cong. & Admin. News 3425; H. R. Rep. No. 1303, 89 Cong. 2d Sess. (1968) at 3, 5; H. R. Rep. No. 1303, 90 Cong. 2d Sess. (1968) at 3, 5-6, 9.

4. It is possible to construe § 2021(b)(3) of the Act so as to give both that section and § 2024(d) full effect. As pointed out to the Seventh Circuit below, § 2021(b)(3) was passed to protect the reservist between the period of his absences, a time period formerly entirely unprotected. It was meant to take the place of the one-year protection from discharge given to veterans, a protection obviously impractical given the reservists recurring absences, and to take into account the heightened prospect of discrimination resulting from an employer's disgruntlement with such recurring absences. Both sections can be given their full sway when each is applied in its proper time period.

The conflicts between the decision below and this Court's decisions concerning the proper construction of the Act and the rights protected by its veterans reemployment provisions justify the grant of certiorari to review the decision below.

II.

THE DECISION BELOW RAISES IMPORTANT AND RECURRING QUESTIONS OF THE CONSTRUCTION TO BE GIVEN A HIGHLY SIGNIFICANT FEDERAL STATUTE.

The statute at issue in this case is the Veterans Reemployment Rights Act, 38 U. S. C. § 2021 *et seq*. That Act governs the rights of all the veterans of the Armed Forces as well as the rights of the nation's almost one and one-half million reservists and national guardsmen and their employers.[5] The importance of this statute is demonstrated not only by the scope of its application, but also by the fact that since its passage in 1940 the Act has been before this Court eleven (11) times[6] with certiorari recently having been granted in a twelfth case, *Coffy* v. *Republic Steel Corp.*, # 79-81, 48 U. S. L. W. 3283 (Oct. 30, 1979). In the first such case, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1945) certiorari was granted by this Court "because of the importance of the question presented." *Supra*, 328 U. S. at 281. Notwithstanding this Court's numerous

5. U. S. Department of Defense, Office of the Secretary, "Selected Manpower Statistics," annual data, 1978.

6. *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U. S. 275 (1945); *Trailmobile Company* v. *Whirls*, 331 U. S. 40 (1947); *Hilton* v. *Sullivan*, 334 U. S. 323 (1948); *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521 (1949); *Oakley, Jr.* v. *Louisville & Nashville Railroad Company*, 338 U. S. 278 (1949); *McKinney* v. *Missouri-Kansas-Texas Railroad Company*, 357 U. S. 265 (1958); *Tilton* v. *Missouri Pacific Railroad Company*, 376 U. S. 169 (1964); *Accardi* v. *Pennsylvania Railroad Company*, 383 U. S. 225 (1966); *Eagar* v. *Magma Copper Company*, 389 U. S. 323 (1967); *Foster* v. *Dravo Corporation*, 420 U. S. 92 (1975); *Alabama Power Company* v. *Davis*, 431 U. S. 581 (1977).

decisions construing and applying the provisions of the Act regarding the reemployment rights of veterans, this Court has not had previous occasion to directly construe either the analogous provision regarding reservists and national guardsmen—§ 2024 (d)—or § 2021(b)(3), which was added by Congress in 1968. The decision below, the first decision of a United States Court of Appeals construing and applying § 2021(b)(3) gives this Court the opportunity to authoritatively construe that section and its interaction with § 2024(d), important and recurring questions of Federal law.[7]

The decision of the Seventh Circuit below, erroneously construed § 2021(b)(3) as requiring employers to take affirmative action to prevent a reservist from losing any "incident or advantage" of employment arising during his absence or to reproduce that incident or advantage upon the reservist's return. 602 F. 2d at 765, 766 (notes 2 and 3), App. pp. 4-6. The Seventh Circuit decision was not limited to "incidents or advantages" of employment within the meaning of "seniority, status, or pay" as guaranteed by § 2024(d) and the provisions governing veterans. In fact, the Seventh Circuit made no attempt to harmonize its construction of § 2021(b)(3) with the more limited protections of § 2024(d) and its construction of § 2021(b)(3) is such as to render § 2024(d) entirely meaningless and superfluous.

The practical effect of the decision below can be seen by the application of the Seventh Circuit's rationale to another "incident or advantage" of employment—the opportunity to work regular

7. The importance for this Court's early resolution of this issue is also demonstrated by the fact that since *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio E. D. 1975), the first case to construe 2021(b)(3) there have been at least six other cases construing 2021(b)(3) one of which, *Breeding* v. *TRW, Inc.*, ... F. Supp. ....., Daily Labor Report, October 22, 1979 (M. D. Tenn. 1979), directly conflicts with *Lott, supra*, and with this case while another, *West* v. *Safeway Stores, Inc.*, 84 CCH Lab. Cas. ¶ 10,905 (N. D. Tex. 1978), directly conflicts with *Monroe* v. *Standard Oil Company*, 446 F. Supp. 616 (N. D. Ohio W. D. 1978), appeal pending, # 78-3233 (6th Circuit).

hours; which, under § 2021(b)(3) as construed below, the employer would be required to guarantee to reservists. *Cf. Monroe* v. *Standard Oil Company,* 446 F. Supp. 616 (N. D. Ohio W. D. 1978), *appeal pending,* # 78-3233 (6th Circuit). Since missed regular hours are incapable of being made up, employers would be required to pay reservists and national guardsmen for such hours. And, since nothing in the statute or its legislative history allows any distinction to be drawn based on the length of the reservist's absence, payment would be required for regular hours missed during the annual two week summer camp at a cost of almost Seven Hundred Million Dollars ($700,000,000.00) annually.[8]

The importance of the questions presented by the decision below and their recurring nature justify the grant of certiorari to review the judgment below and to allow this Court to authoritatively construe the provisions of the Act governing reservists.

III.

THE SEVENTH CIRCUIT'S DECISION ON THE FIFTH AMENDMENT ISSUE CONFLICTS WITH THE DECISIONS OF THIS COURT.

The agreement between Cummins and the Union does not allow make-up of overtime opportunities after the employee transfers from the department where those opportunities occurred. Upon the employee's transfer he must be paid for all overtime opportunities which are not subject to being cancelled.

The decision below held that overtime opportunities missed while on reserve duty were not subject to cancellation upon transfer. Accordingly, under the Agreement such opportunities must be paid for upon transfer. Cummins argued below that the

8. Applying April 1979 figures for average hourly wages for production and non-supervisory workers. (Monthly Labor Review, June 1979, at page 72). Moreover, since the Act contains no statute of limitations employers would be faced with billions of dollars of potential liability back to 1968.

application of the Seventh Circuit construction of § 2021(b)(3) to these facts would result in Cummins being required to pay for overtime which was not and could not have been performed, that this payment was being required for a public purpose, that Cummins received no benefit separate and apart from the general public, and that application of § 2021(b)(3) as construed by the Seventh Circuit to these circumstances, would violate the Fifth Amendment of the United States Constitution.

In tacit acknowledgment of the seriousness of the Fifth Amendment problem which would be raised by requiring Cummins to pay for overtime which was not and could not be worked, the court below avoided confronting this issue by holding, notwithstanding the fact that the Agreement requires payment and forbids make-up after transfer, that payment was not required since the Act required only the opportunity to make up. This holding conflicts with this Court decisions in *Accardi* v. *Pennsylvania Railroad Company,* 383 U. S. 225, 229 (1966); *Aeronautical District Lodge 727* v. *Campbell,* 337 U. S. 521, 526 (1949); *McKinney* v. *Missouri-Kansas-Texas Railroad Company,* 357 U. S. 265, 268 (1958); and *Foster* v. *Dravo Corp.,* 420 U. S. 92, 101 (1975); all of which hold that the terms of an applicable Collective Bargaining Agreement govern and control rights under the Act except to the extent such provisions are an attempt to avoid the Act or otherwise conflict with the Act. In this case, Appendix I § 29, the provision of the Agreement requiring payment upon transfer and prohibiting make-up, does not conflict with the Act and the Court below did not hold that it did.

Under this Court's decisions in *Accardi, supra; Aeronautical District Lodge, supra; McKinney, supra;* and *Foster, supra;* the collective bargaining agreement defines the scope of a reservist's rights unless it conflicts with the Act and at no time in this litigation has Appenix I, § 29 of the Agreement been alleged to conflict with the Act. Accordingly, the Court below erred in ruling that respondent is required to make up the opportunities

when all other employees are required to be paid since this ruling judicially sanctions the denial of rights protected by the Agreement solely because of respondent's reserve status, a per se violation of the Act.

The Seventh Circuit's resolution of the Fifth Amendment issue conflicts with controlling cases of this Court. This conflict justifies the issuance of a writ of certiorari to review the judgment below to either resolve the constitutional issue or to remand that issue to the Seventh Circuit for resolution.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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NOTICE OF POSSIBLE APPLICATION OF 28 U. S. C. § 2403(a).

Petitioner hereby gives notice that the provisions of 28 U. S. C. § 2403 may be applicable in this cause and further states that to petitioner's knowledge the certification required by 28 U. S. C. § 2403(a) was not given by the Courts below.

APPENDIX.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2879
ALAN CARNEY,

Plaintiff-Appellee,

vs.

CUMMINS ENGINE COMPANY.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 77-576-C—S. Hugh Dillin, *Judge*.

HEARD APRIL 13, 1979—DECIDED JULY 17, 1979

Before CUMMINGS and SPRECHER, *Circuit Judges,* and BONSAL, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* Plaintiff sued his employer, Cummins Engine Company of Columbus, Indiana, in order to be permitted to work the overtime hours he missed while he was performing military reserve duty in July of 1975. In the alternative he sought compensation for loss of overtime wages. Both

* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

parties moved for summary judgment. Subsequently the district court granted plaintiff's summary judgment motion and required defendant to grant plaintiff the overtime work opportunities he missed by reason of his National Guard Service or to pay him for the unworked overtime.

The summary judgment was preceded by Judge Dillin's Memorandum of Decision in which he found that plaintiff was assigned to the job of engine assembler on August 26, 1974, until he was transferred to another department of defendant on September 2, 1975. He noted that plaintiff is a member of the Diesel Workers' Union which has a collective bargaining contract with defendant. He found that the agreement between defendant and the Union from 1972 to 1978 provided that overtime opportunities would be distributed equally among employees present, available and qualified to perform the work. Beyond certain specified limits, the employer was required to correct errors in assigning overtime work within 30 days of the time such errors were brought to the employer's attention. If such "out of limits" overtime was not corrected within 30 days or if the employee transferred to another department before making up all the overtime to which he was entitled, the collective bargaining agreement provided that the employer must pay for the accrued overtime even though it was not worked. The agreement also established a recording procedure to account for overtime assignments. If an employee refused proffered overtime work or he was absent when the opporunity for such work arose (other than on a formal or disability leave), he was charged as if he had worked the offered overtime. Until July 1975, this system was applied to reservists so that when they were absent for training they lost overtime opportunities to which they would otherwise have been entitled.

When advised by a compliance officer of the Department of Labor that this system was contrary to the Veterans' Reemployment Rights Act, the employer and the Union modified the agreement to provide that reservists away for training would not

be charged as having worked available overtime and would be entitled to make up missed overtime opportunities. However, with regard to reservists this modification suspended the employer's obligation to pay for missed overtime if not offered within 30 days or not made up before the employee transferred departments. The employer defends this aspect of the modification on the ground that the overtime missed by reservists is not attributable to the fault of the employer, unlike accrued overtime resulting from inequitable assignments. The effect of the modification, however, is to defeat the right of reservists to work missed overtime opportunities if—as the plaintiff did here—they transfer departments before working the overtime.

The district court held that plaintiff must prevail under 38 U. S. C. § 2021(b)(3) which provides:

> "Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

Citing *Tilton* v. *Missouri P. R. Co.*, 376 U. S. 169, and *Hanna* v. *American Motors Corp.*, 557 F. 2d 118 (7th Cir. 1977), Judge Dillin ruled that any provisions of the collective bargaining agreement between defendant and the Union could not be used as a basis for denying an employee the rights granted under the foregoing Section of the Veterans' Reemployment Rights Act, and that plaintiff's opportunity to work overtime qualified as an "incident or advantage of employment" within the meaning of that Section. Consequently, defendant was ordered to make up plaintiff's lost overtime opportunities or to pay him appropriate compensation therefor. We affirm.

Defendant admits that during plaintiff's attendance at summer camp with the Indiana National Guard in July 1975, he missed the opportunity to work one 3-hour overtime period on July 15 and an 8-hour period on July 19 (App. 11). Defendant permitted him to make up three hours of overtime before he was

transferred to another department on September 2, 1975 (App. 23). However, he was denied the right to make up the remaining eight hours of overtime because the defendant took the position that when he transferred to another department he lost the right to make up cumulative overtime opportunities and was not entitled to be paid for any accumulated unworked opportunities (App. 10, 27). We hold that Section 2021(b)(3) of the Veterans' Reemployment Rights Act precludes such a defense. That Section was enacted in 1968 because Congress considered prior statutory protection for servicemen to be inadequate and wanted to make certain that reservists' economic well being would be disrupted to the minimum extent possible. H. R. Rep. No. 1303, 90th Cong., 2d Sess. (1968) 1, 3; Sen. Rep. No. 1477, reproduced in 3 U. S. Code Cong. & Admin. News (90th Cong., 2d Sess. (1968) 3421-3422).

In accord with *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio 1975), defendant has conceded that the opportunity to work overtime is an "incident or advantage of employment" within the meaning of Section 2021(b)(3), that said phrase must be broadly construed, that it covers all aspects of the employment relationship, and that Section 2021(b)(3) was enacted to prevent discrimination by the employer against reservist employees. (Reply Br. 1-2.)

To avoid affirmance of the summary judgment for plaintiff, the employer defendant argues that Section 2024(d) of the Act is the only governing provision. Section 2024(d) provides in pertinent part:

> "Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training * * * such employee shall be permitted to return to such employee's position with

> such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes * * *." (38 U. S. C. § 2024(d)).

According to defendant, this provision would not permit plaintiff to receive the overtime opportunities that he would have had if he had not been on military leave, since his rights under this Section are limited to seniority, status, pay and vacation. We need not so construe Section 2024(d) because we agree with the *Lott* court and other courts[1] that this case is governed by Section 2021(b)(3).[2] Defendant argues that Section 2024(d) controls here because "general language in a statute [Section 2021(b)(3)] which would otherwise apply is limited and controlled by a section specifically dealing with an issue" (Br. 10). Since the reference to "seniority, status, pay and vacation" in Section 2024(d) is more specific than "other incident or advantage of employment" in Section 2021(b)(3), defendant contends the former must control. This argument, however, ignores the fact that, as seen, Section 2021(b)(3) was added specifically to protect rights of reservists which had been found to be inadequately protected under Section 2024(d). The general language in Section 2021(b)(3) is best construed as an attempt to assure protection from a wide variety of economic disadvantages that could result from a reservist's absence.[3]

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1. *Monroe* v. *Standard Oil Co.*, 446 F. Supp. 616 (N. D. Ohio 1978) (regular pay); *Hanning* v. *Kaiser Aluminum & Chemical Corp.*, 82 CCH Labor Cases ¶ 10,070 (E. D. La. 1977) (holiday pay); *Kidder* v. *Eastern Airlines, Inc.*, 85 CCH Labor Cases ¶ 10,973 (S. D. Fla. 1978) (holiday pay).

2. The defendant construes the district court's imposition of an obligation to make available the missed overtime opportunities as resulting not from the statute but only from defendant's voluntary collective bargaining agreement modification in favor of reservists of the procedure for keeping track of overtime. It argues that this result is contrary to public policy since it will discourage employers from voluntary compliance. In fact, the employer's obligation here was held to be and is a consequence of the statute and would have been the same regardless of its partial voluntary compliance with the Act.

3. Defendant asserts that the reasoning of the courts in *Hanning*, *Kidder*, *Lott*, and *Monroe* (*supra* note 1) and in this case would

(Footnote continued on next page.)

Contrary to defendant's contention, it is not "inconceivable" that Congress could have intended to grant reservists greater protection than veterans returning from active duty. That is the clear import of Section 2021(b)(3), and it is not illogical to extend to reservists some protection, such as the overtime opportunities missed here, that would simply not be practicable for the longer-term absences of veterans.

It is immaterial that non-military employees of defendant on leave of absence would not be entitled to overtime opportunities (*Alabama Power Co.* v. *Davis,* 431 U. S. 581, 591; *Kidder* v. *Eastern Airlines, Inc., supra,* at p. 19,754), since the right of reservists to such opportunities is governed by statute rather than by the collective bargaining agreement. Nor does it matter that affording plaintiff relief might conflict with the collective bargaining agreement between defendant and the Union. *Lott, supra,* 395 F. Supp. at 869-870; see also *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U. S. 265, 268-269; *Peel* v. *Florida Department of Transportation,* 443 F. Supp. 451, 455, 459 (N. D. Fla. 1977).

Finally, defendant briefly argues that our construction of Section 2021(b)(3) would constitute a taking for a public

(Footnote continued from preceding page.)
compel an employer to pay the reservist as if he had worked when in fact he did not. This is not the case. *Hanning* and *Kidder* involved entitlement to holiday pay which was available to all employees who were present the week in which the holiday fell. Since all that was required was the mere presence of the employee—and not his actual work—those cases correctly held that the holiday pay could not be withheld when the employee would have been present but for his reserve obligation. *Lott* and *Monroe,* like this case, involved what accommodations an employer is required to make to assure that reservists do not miss work opportunities. In *Lott,* as here, the employer was required to make missed overtime opportunities available. In *Monroe,* the employer was required to manipulate the flexible work schedule so that the reservist was not scheduled for work on days he was required to be in training. It is true that the remedy in *Monroe* was the payment of lost wages. This, however, was the only feasible remedy for the employer's illegal failure to accommodate the reservist's schedule and was not the result of imposing a general obligation on the employer to pay the reservist as if he had worked when he was in training.

purpose without compensation in violation of the Fifth Amendment. In the first place, to comply with the judgment below, the defendant need not pay plaintiff for eight hours unworked overtime but need merely permit him to work the eight hours overtime in either his former or present department.[4] To the extent that defendant has the alternative choice of paying plaintiff for unworked time pursuant to the judgment, the statute is clearly constitutional. *Davis* v. *Alabama Power Co.,* 383 F. Supp. 880, 891 (D. Ala. 1974), affirmed *per curiam,* 542 F. 2d 650 (5th Cir. 1976), affirmed, 431 U. S. 581; *Jennings* v. *Illinois Office of Education,* 589 F. 2d 935, 938 (7th Cir. 1979), certiorari denied, 47 LW 3761.

Judgment affirmed.

A true copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

4. Allowing plaintiff to work the overtime hours in his former department would not constitute discrimination against reservists even though other employees are paid for "out of limits" accrued overtime without actually working that overtime when they transfer departments. The overtime rights of non-reservists are governed by the collective bargaining contract and employees accrue overtime rights only if the employer assigns overtime work inequitably in the first place. The statute, however, provides an additional right for a reservist—the right to be offered the overtime he would have been offered had he been working on the days he was on reserve duty. Since this is all that the statute requires, it is not discriminatory to offer such overtime in the former department even though if the overtime had accrued through the fault of the employer it would have become compensable immediately upon the employee's transfer.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

ALAN CARNEY,
Plaintiff,
vs.
CUMMINS ENGINE COMPANY, INC.,
Defendant.

No. IP 77-576-C

MEMORANDUM OF DECISION

This matter comes before the Court on cross-motions for summary judgment. This Court has jurisdiction of the matter pursuant to 38 U. S. C. § 2022.

Facts

The plaintiff, Alan Carney, a member of the Indiana National Guard, has been employed at Cummins Engine Company, Inc., since October 15, 1968. He was assigned to the job of engine assembler on August 26, 1974, and he remained in that job until his transfer to another department on September 2, 1975. The plaintiff is a member of the Diesel Workers' Union and hence, has been bound by the terms and conditions of the then applicable Collective Bargaining Agreement (hereafter Agreement) between the union and Cummins.

The 1972-1975 Agreement provided that overtime opportunities would be distributed equally among employees present, available and qualified to perform the work and that any errors in the assignment of such work by Cummins would have to be kept within the limits specified in Appendix I, Section 2 of the

Agreement. This section of the Agreement specified that if Cummins erred in the assignment of overtime, either intentionally or through inadvertence, and exceeded the specified limits, it was required to correct such error within 30 days of the time the error was brought to its attention or pay the employee what he would have earned if he had worked. (Appendix I, § 20.) In addition, if an employee transferred from the department before the overtime had been made up, the Agreement required that Cummins pay for the overtime even though the 30 day period had not yet passed. These provisions were also incorporated into the 1975-1978 Agreement (hereafter Agreement II).

A recording procedure was also instituted by Cummins to monitor its compliance with the contractual provisions. Under the procedure as set out in the Agreement, if an employee is offered and refuses overtime, he is charged as if he had worked it. If an employee is on a formal or disability leave of absence, his or her name is deleted from the list. Prior to July, 1975, if an employee was absent for *any* reason other than a formal disability leave of absence and an overtime opportunity occurred, the employee was charged as if he had worked the overtime.

On or about July 9, 1975, Cummins received a letter from Don Payton, resident compliance officer for the United States Department of Labor, Labor-Management Services Administration, 230 South Dearborn Street, Chicago, Illinois. In that letter, Cummins was advised that the Labor Department's position was that Cummins' policy regarding overtime opportunities was contrary to federal law. Following receipt of Payton's letter, the union and Cummins met to discuss the issues raised by the letter. The parties agreed to a contract modification which provided that employees who were absent because of military obligations when an overtime opportunity arose, which they would have otherwise been offered, would not be charged as if they had worked such overtime. Rather, such employees would be marked as having been absent because of military obligations and would

be entitled to make up such missed overtime opportunities in the future so long as they remained in the department where they worked when the opportunity first arose.

Following the contract modification, plaintiff attended summer camp with the Indiana National Guard. Between the time of the modification and the Indiana National Guard summer camp, the plaintiff transferred to another department before being allowed to make up all the overtime he had missed.

On February 4, 1976, Ronald S. Lehman wrote Cummins, advising Cummins that it was plaintiff's contention that Cummins was obligated by federal law to pay plaintiff for the overtime opportunities he had accumulated when plaintiff transferred departments. This lawsuit followed as a result of defendant's continuing belief that its policies did not violate federal law.

Discussion

The provisions of a labor agreement may not be used as a basis for denying an employee rights secured under 38 U. S. C. § 2021(b)(3). *Tilton v. Missouri Pacific Railroad Co.*, 376 U. S. 169, 11 L. Ed. 2d 590, 84 S. Ct. 595 (1964). *Hanna* v. *American Motors Corp.*, 557 F. 2d 118 (7 Cir. 1977). Any labor agreement which would produce what is forbidden by the Military Selective Service Act (hereafter Act) must be considered null and void.

The principle underlying the Act is that he who is "called to the Colors [is] not to be penalized on his return by reasons of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock Repair Corp.*, 328 U. S. 275, 284 (1946); accord, *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, 357 U. S. 265, 270 (1958). With that principle in mind, it is the duty of this Court to liberally construe the Act for the benefit of servicemen and reservists. *Barrett* v. *Grand Trunk Western Railroad Company*, 7 Cir. slip opinion (decided July 17, 1978).

Turning to the case at bar, the plaintiff contends that, as a military reservist, he is entitled by law to all of the incidents or advantages of employment which he would have enjoyed had he been present on the job rather than absent in the service of his country. In particular, the plaintiff contends he was wrongfully denied the opportunity to make up overtime he missed because he was away from his job on reservist military duty. In addition, it is the position of the plaintiff that the fact that a nonreservist with an unused overtime account would have lost such make up opportunities upon transfer to a different department provides no legal basis for denial of such opportunities to the plaintiff.

The defendant insists that what plaintiff seeks by this action is a benefit outside the mandate of the Act. The defendant contends that the contractual provisions in question clearly show that neither the original Agreement, nor Agreement II violate the Act. Moreover, the defendant asserts that if the plaintiff were to prevail in this action, he would receive an additional benefit not enjoyed by his coworkers and not contemplated by the Act. *Foster* v. *Dravo Corporation*, 420 U. S. 92 (1975).

It is clear that the Act requires employers to provide returning servicemen and reservists with all of the "incidents or advantages of employment which he would have enjoyed had he been present on the job rather than absent in the service of his country." 38 U. S. C. § 2021(b)(3). Acts of Congress are seldom drawn with such clearness of language that everyone agrees with a single statutory construction. The written word is susceptible to many interpretations and determining with certainty what Congress intended when drafting the Act is not a simple matter. In consideration of the recent decision in *Barrett, supra*, at 5, by liberally construing the Act the Court finds the law to be with the plaintiff and therefore grants the motion of the plaintiff for summary judgment.

Three other District Courts have faced similar questions of law. All three decisions were for the plaintiff and all three ruled that the Act required positive protection, to assure that the

reservists suffer no disadvantage or detriment by reason of their military obligation. *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio 1975); *Monroe* v. *Standard Oil Co.* (N. D. Ohio E. D. Civil No. C76-71, February 22, 1978); *Hanning* v. *Kaiser Aluminum and Chemical Corp.*, 82 CCH Lab. Cas. ¶ 10.070 (E. D. La. 1977).

In *Lott*, a reservist brought action against his employer to challenge his employer's actions in marking him up for overtime which he was unable to work because of reserve duty. The Court in *Lott* determined that the opportunity to work overtime qualified as an "incident or advantage of employment . . . ." Id. at 869.

The defendant in *Lott* conceded that the plaintiff's unavailability to work the overtime resulted in some detriment. But the defendant argued the neutrality of the collective bargaining agreement by reasoning:

> ". . . overlooks the fact that all employees are charged with overtime, for purposes of equalization without regard to the reason that the employee may refuse or be unavailable to accept overtime work." *Lott* at 869.

The Court was not impressed with the defendant's argument. The argument of the defendant, while perfectly compatible with the collective bargaining agreement, nullified the express protections of § 9(c)(3). The Court held the following:

> "Carrying out its congressional purpose section 9(c)(3) entitles a reservist, who cannot take advantage of overtime work because of his military duty, to be equated with a person who is able to work overtime. Since the latter person draws overtime pay, unless he voluntarily chooses not to exercise the opportunity, the reservist should not be marked up for overtime that he could not take advantage of because of his military duty." *Lott* at 870.

In *Hanning*, two reservists who had taken leave of absence from their employment to perform their active military duty were denied holiday pay because the holiday fell during the time

that they were on active duty training. Under the labor agreement which extended to the plaintiffs, the employer was perfectly within its rights to deny the plaintiffs holiday pay.

The Judge in *Hanning* responded to defendant's position by holding the following:

> "We read this as meaning that defendant is required under the statute to treat reservists on active duty training who find themselves in the position of these two plaintiffs as though they were still at work. They would have been paid for the July 4th holiday, as were their coworkers without such military obligation." At 82 L. C. ¶ 10.071.

The decision in *Monroe* reaches substantially the same result as *Lott* and *Hanning*. For this reason, the Court will not detail the holding or reasoning which support the decision in *Monroe*.

Returning to consideration of the case at bar, it is at once apparent that the defendant's position regarding departmental transfers is naive. Even though Agreement II contains a forfeiture clause if a person transfers departments before making up overtime opportunities, that provision is irrelevant to the present controversy. Since it is clear that the reservist must be treated as if he worked the days he was absent, it follows that he must *voluntarily* choose to refuse the overtime at a later date. Plaintiff never indicated that he was refusing overtime opportunities.

The final step in the syllogism is—plaintiff would have worked overtime but for his absence because of his military obligation. Since plaintiff would have worked the overtime, there would have been *no* carry over opportunities because plaintiff would have worked his full entitlement. The provision in Agreement II, therefore, works a hardship on plaintiff in violation of the Act. Plaintiff lost overtime opportunities solely because of his military duty and except for that duty, would have been available to work. Since the Act requires the reservist be treated as if he worked, the forfeiture clause is an impermissible burden on plaintiff and cannot shield the defendant from its obligation to

allow plaintiff to make up what overtime opportunities to which he is entitled.

Accordingly, the defendant is ordered to permit the plaintiff to make up whatever overtime opportunities he missed as a result of his departmental transfer, or to pay to the plaintiff appropriate compensation in lieu thereof. Counsel are directed to meet within 10 days, agree as to which of the foregoing methods shall be utilized, and present to the Court an appropriate form of judgment.

Dated this 25th day of August, 1978.

/s/ S. HUGH DILLIN
S. Hugh Dillin,
Judge

Copies to:

Virginia Dill McCarty, United States Attorney, 274 U. S. Courthouse, Indianapolis, Indiana 46204 (George E. Palmer, Assistant)

Martin J. Klaper, 10th Floor, 111 Monument Circle, Indianapolis, Indiana, 46204

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

ALAN CARNEY,
Plaintiff,
vs.
CUMMINS ENGINE COMPANY, INC.,
Defendant.

Cause No.
IP 77-576-C

JUDGMENT

The Court having filed its Memorandum of Decision, granting plaintiff's Cross-Motion for Summary Judgment and granting certain relief to the plaintiff, as follows:

(H. I.)

IT IS CONSIDERED AND ADJUDGED that defendant shall, at its option, transfer those overtime opportunities missed by the plaintiff by reason of his National Guard obligation to his new department or pay the plaintiff for the missed overtime opportunities which are not transferred.

IT IS FURTHER CONSIDERED AND ORDERED that the defendant pay the costs of this section.

Dated this 27th day of September, 1978.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
District Judge

COPIES TO:

George Palmer, Assistant United States Attorney, 274 U. S. Courthouse, Indianapolis, IN 46204

David L. Gray of Ice Miller Donadio & Ryan, 111 Monument Circle, 10th Floor, Indanapolis, IN 46204

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, on in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopary of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Pertinent Statutory Provisions

§ 2021. *Right to reemployment of inducted persons; benefits protected*

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or

political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

* * * * *

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; . . .

(b) (1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave or absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the

Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who holds a position decribed in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

§ 2022. *Enforcement procedures*

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

§ 2024. *Rights of persons who enlist or are called to active duty; Reserves*

* * * * *

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calender day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period period after expiration of the

time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

§ 2025. *Assistance in obtaining reemployment*

The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.

AFFIDAVIT OF KEVIN E. SHEEHAN

State of Indiana
County of Bartholomew } ss.

Kevin E. Sheehan, being first duly sworn upon his oath, says:

1. I, Kevin E. Sheehan, am currently employed by Cummins Engine Company, Inc., Columbus, Indiana. I have been so employed since July 19, 1971.
2. From November 15, 1971 to October 15, 1977 I worked in the Employee Relations department of Cummins in various capacities. I participated in negotiating two Collective Bargaining Agreements between Cummins and the Diesel Workers' Union, the union which represents the production and maintenance employees employed with Cummins. The first was for the period April 1972-April 1975 and the second was for the period April 1975-April 1978.
3. During negotiations for the 1972-1975 Cummins-DWU Collective Bargaining Agreement, a copy of which is attached hereto and marked as Exhibit A, a provision was inserted into the parties agreement for the purpose of preventing discrimination by the Company in assigning overtime to employees who were present, or had made themselves available and who were qualified to perform the overtime. This provision was included as Appendix I, Section 2. There was no intent to equalize overtime pay received among employees. Under this provision the Company agreed that the need for overtime work would be distributed equally amongst employees present, available and qualified to perform the work and that any mistakes in assignment of such work by the Company would have to be kept within specified limits. If the Company erred in assignments and exceeded the specified limits, it was required by Appendix I, Section 20 to correct such error within 30 days

or pay that portion of overtime not within the specified limits. If an employee transferred from a department prior to the time the Company had a chance to correct an overtime assignment error, Appendix I, Section 20 required that the Company pay the employee for its error thereby overriding the 30 day correction period.

4. Appendix I, Section 2 of the 1972-1975 Cummins-DWU Agreement was carried forth into the 1975-1978 Agreement and again appeared as Appendix I, Section 2. Appendix I, Section 20 of the 1972-1975 Agreement was carried forth into the 1975-1978 Agreement and became Appendix I, Section 29. A copy of the 1975-1978 Cummins-DWU Agreement is attached hereto and marked as Exhibit B.

5. Pursuant to its contractual commitment to distribute overtime fairly amongst present, available, qualified employees, the Company adopted a recording procedure for monitoring overtime distribution. Under this procedure, which initially appeared as Appendix I, Section 19 of the 1972-1975 Agreement and was carried forward into the 1975-1978 Agreement as Appendix I, Sections 14, 17, 18, 19, and 20, the Company monitored overtime distribution in the following manner:

   i) If an employee was offered overtime and turned it down he was charged as if he had accepted and worked it. The symbol placed on the overtime roster ot indicate such a situation was either (W), PC, CN, (LH), LHPC, LHNQ, (LG), LGPC, LGNQ or (LS), LSPC, LSNQ, (L), LPC, or LNQ. The symbol used would depend whether the refused opportunity occurred on the employee's assigned job or other available jobs.

   ii) If an employee was offered overtime and accepted, the symbol placed on the overtime roster to indicate such a situation was either W, LH, LG, LS, or L.

   iii) If an employee was not available and present to be offered an overtime opportunity, the symbol placed on the overtime roster to indicate such a situation would be either A, V, LHA, LGA, LSA or LA. The symbol used would depend on where the overtime opportunity existed. If an employee were absent for *any* reason, be it medical leave, personal business, jury duty, funeral leave, vacation, etc., and an overtime opportunity occurred, the employee would be charged as if he had worked the opportunity and either the symbol A, V, LHA, LGA, LSA or LA would be entered next to the employee's name on the overtime roster for that day.

   iv) If an employee was not available and present to be offered an overtime opportunity because the employee was on a formal leave of absence or on a disability leave of absence, the employee's name would not appear on an overtime roster and the Company was relieved of any overtime distribution obligation regarding that employee.

6. Under the overtime distribution provisions of the Collective Bargaining Agreement between Cummins and the DWU, the only situations wherein the Company is obligated to pay an employee for a missed overtime opportunity is when the Company makes an error in assigning overtime and the Company's assignment error causes the Company to exceed the limits placed upon it under the contract and this error cannot be rectified within 30 days by scheduling a make up opportunity or the employee transfers prior to the expiration of the 30 day period. Under the overtime distribution provisions of the Collective Bargaining Agreement between Cummins and the DWU, no employee can absent himself from work, not made himself available to work, and during such absence, regardless of the reason for the absence, create a situation wherein the Company can be held liable for failing to offer that employee overtime opportunities

which existed during that employee's absence. The Company can be held liable only in situations where an employee is present and available to work overtime, is entitled to the overtime, and the Company errs and fails to offer that employee the available overtime.

7. On or about July 9, 1975, Cummins received a letter from Don A. Payton, Resident Compliance Officer for the U. S. Department of Labor, Labor—Management Services Administration, 230 South Dearborn Street, Chicago, Illinois. In this letter, Payton advised Cummins that it was his department's posture that Cummins' policy of charging an employee as having been asked and as having refused overtime when the employee was not able to accept the offered overtime due to the employee's National Guard military commitment was contrary to the Federal law. In support of his position, Payton submitted a copy of a decision rendered by the United States District Court for the Northern District of Ohio, Eastern Division. A copy of this decision, entitled Richard A. Lott v. Goodyear Aerospace Corporation, is enclosed herein and marked Exhibit C.

8. Following receipt of Payton's letter, I met with representatives of the Diesel Worker's Union to discuss the issue raised by Payton. It was the Company's position that if the Union was agreeable, the Company would also be agreeable to modifying its overtime charging procedures so long as it was understood that any overtime opportunity missed becaues of an employee's military obligations would not result in an out of contract or limits situation subject to payment as defined in Appendix I, Section 29 of the 1975-1978 Labor Agreement since such a missed opportunity could not be attributed to a Company error in assignment. The Union stated that it was agreeable to such a change in the overtime charging procedures and the Company and Union formally adopted such an Agreement. This agreement gives

such employees and advantage over other employees in that it assumes that the employee absent because of military duty would have accepted the overtime offered whether he/she would have or not. A copy of this Agreement is enclosed herein and marked as Exhibit D. Also enclosed herein and marked as Exhibit E, is a copy of the notice that was posted by the Company informing its employees of the change described in Exhibit D. On July 15, 1975, Cummins advised Payton by letter of its agreement with the Union to modify the overtime charging policy. A copy of this letter is enclosed herein as Exhibit F.

9. On or about October 8, 1975, Cummins received a letter from John W. Beaty, the Area Director of the U. S. Department of Labor in Chicago. A copy of this letter is enclosed herein as Exhibit G. In this letter, Beaty advised Cummins that Alan Carney, a Cummins employee, was contending that he was entitled to payment for overtime opportunities missed while attending summer camp with the Indiana National Guard because he was only allowed to make up one unit of incidental overtime missed as a result of his National Guard training before being transferred to another department. Cummins, through counsel, on October 24, 1975, advised Mr. Beaty that the overtime opportunities Carney missed as a result of his National Guard duty had been recorded pursuant to the recently adopted policy outlined in Exhibit D and that he would have been allowed to make them up had he not transferred departments, but that when he transferred, he, like all employees, lost the right to make up accumulated opportunities and that he was not entitled to be paid for any accumulated unworked opportunities other than those attributable to Company assignment error. On February 4, 1976, Ronald S. Lehman, representing John Beaty, wrote Cummins to advise that it was Carney's contention or position that when Cummins

modified its overtime distribution procedures to provide that employees would not be charged for missed overtime opportunities due to absences for military duty, that it was obligated to treat such non charged absences as subject to the make up or pay provisions of Appendix I, Section 29 and that treating such absences differently, constituted a violation of Federal law.

10. Under the provisions of the current Collective Bargaining Agreement between Cummins and the Diesel Workers' Union, as that Agreement was modified by the execution of the document enclosed herein as Exhibit D, the only situation wherein an employee who is unavailable to work an overtime opportunity is not charged for his unavailability as if he had worked it, is when the employee is absent due to military obligations. In such situations, the employee is not charged with an overtime opportunity but the reason for his absence is noted. However, since such credited opportunities are due to a policy which applies to and favors only military personnel and is unrelated to any Company error in assignment, such opportunities are not subject to the payment for mistake policy outlined in Appendix I, Section 29. Accordingly, the Company does not pay an employee who has accumulated overtime opportunity credits due to unavailability attributable to military obligations if the employee transfers departments prior to making up such opportunities. Furthermore, the obligation of the Company under Appendix I, Section 29 to schedule make up within 30 days is not applied to make up opportunities attributable to unavailability because of military obligation. The only time the Company pays an employee who has accumulated overtime opportunities is when the accumulated opportunities are attributable to prior Company errors in assignment or offering of such opportunities and make up has not been scheduled within 30 days of the error or make up is not possible because the employee

transfers out of the department or area in which his make up rights existed prior to the expiration of the 30 day make up period.

11. In the letter sent Cummins by the Department of Labor on October 8, 1975 (Exhibit G), Cummins was advised that Alan Carney was contending that he missed overtime opportunities while attending summer camp with the Indiana National Guard from July 12, 1975 to July 27, 1975. The records of Cummins Engine Company indicate that during this July 12-July 27, 1975 period, Carney missed the opportunity to work one 3 hour period of incidental overtime on July 15, 1975 and one 8 hour period of Saturday overtime on July 19, 1975. Pursuant to the overtime policy as set forth in Exhibit D, Carney was not charged as having worked these two opportunities even though he would have been charged had he been unavailable for any other reason. On September 2, 1975, Carney was transferred from the department in which the overtime opportunities on July 15 and July 19, 1975 existed and he was not paid for these accumulated but yet unworked overtime opportunities attributable to his absence for military duty.

/s/ KEVIN E. SHEEHAN
Kevin E. Sheehan

Subscribed and sworn to before me, a Notary Public, in and for Bartholomew County, State of Indiana, this 28th day of March, 1978.

/s/ KATHLEEN ELMORE
Notary Public
County of Residence
/s/ BARTHOLOMEW

My Commission Expires:
April 14, 1981

Excerpts from 1972-1975 Collective Bargaining Agreement

(Exhibit A to Affidavit of Kevin Sheehan)

1. INTENT

A. To insure that employees on the same interchangeable job rosters on the same shift receive equal (within limits) opportunities to work overtime.

B. To insure that like interchangeable job rosters on different shifts share the overtime worked in proportion to the number of employees assigned to each shift roster.

C. To insure that when loan-out overtime is required, it is assigned in a fair manner to those qualified employees who have indicated a desire to work.

2. EQUALIZATION LIMITS

Overtime among employees assigned to interchangeable jobs within each Department and/or interchangeable group and between shifts must be equalized within the following limits:

(a) Saturday overtime will be held to within two days.

(b) Sunday and holiday overtime will be held to within one (1) day.

(c) Incidental overtime will be held to within three (3) units. Each unit will be three (3) hours. Incidental overtime shall not be worked in excess of three (3) hours.

The three overtime equalization categories in A, B, and C above shall be maintained separately in accordance with the procedures outlined below.

19. RECORDING OVERTIME

Overtime records for each shift will consist of three sheets:

A. Incidental overtime must be recorded on respective overtime roster at the time of offering.

B. Saturday, Sunday and holiday overtime must be recorded on the respective overtime rosters no later

than the first four (4) hours, after the beginning of the normal shift of the following work week.

First level supervisors will record all overtime in the following manner: (1) W—worked. (2) (W)—scheduled but asked off. (3) A—absent. (4) V—vacation. (5) LH—loan out worked in home department. (6) (LH)—loan out declined in home department. (7) NQ—not qualified. (8) PC—physical code. (9) NS—no show. There will be a carryover from year to year.

Second level supervisors will use all the symbols listed above, plus the following: (1) LG—loan out worked in General Foreman area. (2) (LG)—loan out declined in General Foreman area. (3) LS—loan out worked in Superintendent's area. (4) LS—loan out declined in Superintendent's area. (5) L—loan out worked in open area. (6) (L)—loan out declined in open area. (7) P. C.—physical code (not capable to perform job). (8) NQ—not qualified.

20. OVERTIME OUT OF LIMITS

Violations or administrative errors will be corrected by a cash settlement within a maximum of 30 days from the time the foreman making the error is contacted by the Union or the employee in accordance with the first step of the grievance procedure and it is not possible to correct the error by make-up work on the employee's assigned job or duties, providing the employee is out of contract on his assigned job or duties. In cases where the employee is out of contract on loan-out, the make-up will be through the loan-out procedure. If at the end of thirty (30) days the Company has been unable to correct their error through make-up in accordance with this paragraph the aggrieved employee will be paid a cash settlement for the money he would have earned if he had worked.

At the time of the semi-annual audit, if it is determined an employee or employees are out of contract with their overtime, the Company will make up this overtime within thirty (30) days using the same rules established in this Section.

Excerpts from 1975-1978 Collective Bargaining Agreement (Exhibit B to Affidavit of Kevin Sheehan)

APPENDIX I

OVERTIME POLICY/PROCEDURES

1. PURPOSE
   - A. To insure that when any overtime is required all overtime assignments are made in accordance with the procedure outlined in this Appendix I.
   - B. To insure that when overtime is required, accurate records must be kept.
2. EQUALIZATION LIMITS
   - A. Overtime opportunities among employees assigned to non-interchangeable jobs must be equalized across shifts within the following limits:
     1. Two Saturdays
     2. One Sunday and/or Holiday
     3. Three units of incidental (3 hrs. each)
   - B. Overtime opportunities among employees assigned to an interchangeable group on the same shift must be equalized within the following limits:
     1. Two Saturdays
     2. One Sunday and/or Holiday
     3. Three units of incidental (3 hrs. each)
   - C. Overtime between shifts for interchangeable groups that have an equal number of employees assigned per shift must equalize the need for overtime within the following limits:
     1. Two Saturdays per employee assigned
     2. One Sunday and/or Holiday per employee assigned
     3. Three units of incidental per employee assigned

   - D. In unequal interchangeable groups, needs must be given the smaller shift(s) in proportion to the number of needs on the shift(s) having the larger number of employees assigned. The shift or shifts having the smaller number of employees assigned may work up to the number of needs on the larger shift.

Employees working loan-out overtime will maintain their labor grade regardless of assignments.

14. HOME DEPARTMENT LOAN-OUT

The first line supervisor must try to fill his home department loan-out needs from his department first. Home department loan-out overtime opportunities must be offered in rotation of the home department roster. Home department loan-out opportunities do not count in any employees accumulated totals for equalization purposes on his own job.

The symbols used for home department loan-out are: LH, (LH), LHV, LHA, LHPC, LHNQ. LHNQ and LHPC does not eliminate an employee from overtime on other levels of overtime. After the roster is exhausted and there are jobs that an employee that was marked LHNQ or LHPC can operate, the roster must be rotated again to pick them up before going to 2nd level loan-out to fill the job. The roster must continue to be rotated until the need is filled or the roster has been exhausted.

17. RECORDING OVERTIME
   - A. Incidental overtime must be recorded on respective overtime roster at the time of offering.
   - B. Saturday, Sunday and holiday overtime must be recorded on the respective overtime roster no later than the first four (4) hours, after the beginning of the next regular work day.
   - C. All overtime recording must be made in ink.
   - D. A sign off sheet will be used for the scheduling of an employee's assigned job for Saturday, Sunday and

holiday overtime. The employee must initial in that he was given an opportunity or he will automatically be charged. At the same time, employees will be asked if they are available for home department and loan-out overtime.

E. When a verified attempt is made to schedule an employee for loan-out overtime by telephone, the employee must be charged on the appropriate roster.

18. LOAN-OUT OVERTIME—2ND LEVEL

After home department overtime has been run all unfilled needs are to be filled from a 2nd level loan-out roster. The initial 2nd level loan-out roster must list every employee within the loan-out boundary in seniority order. The roster must be run in rotation. Any employee not working in his home department for any reason except turndown, is eligible for loan-out work. The symbols used for 2nd level loan-out are:

LG, (LG), LGA, LGPC, LGNQ

All symbols used for home department may also appear on the 2nd level loan-out roster.

After the roster is exhausted and there are jobs that an employee that was marked NQ or PC can operate, the roster must be rotated again to pick them up before going to 3rd level loan-out to fill the job.

The roster must continue to be rotated until the need is filled or the roster has been exhausted.

19. LOAN-OUT PROCEDURE

When a 3rd level supervisor's area is established, 2nd level rosters will be put in sequential order and loan-out overtime outside the 2nd level offered in that 3rd level area will be accomplished by rotating the 2nd level rosters according to that sequence.

Each 2nd level superivsor's roster in the sequence shall be rotated to the bottom of that roster for 3rd level overtime before consideration is given to the next 2nd level roster in the sequence.

The symbols used for 3rd level loan-out are: LS, (LS), LSA, LSPC, and LSNQ. Third level overtime will continue to be run until the need is filled or all second level rosters wihin the third level area are exhausted.

20. LOAN OPEN

After a 3rd level area has been exhausted, loan open overtime may be used to fill the remaining needs. Loan open overtime may be offered after all 3rd level overtime within that area has been scheduled, and will be recorded as L, (L), LA, LPC and LNQ. Loan open overtime will be offered in the same manner as 3rd level overtime.

29. OVERTIME OUT OF LIMITS

Violations or administrative errors will be corrected by a cash settlement within a maximum of 30 days from the time the foreman making the error is contacted by the Union or the employee in accordance with the first step of the grievance procedure and it is not possible to correct the error by make-up work on the employee's assigned job or duties, providing the employee is out of contract on his assigned job or duties. In cases where the employee is out of contract on loan-out, the make-up will be through the loan-out procedure. If at the end of thirty (30) days the Company has been unable to correct their error through make-up in accordance with this paragraph, the aggrieved employee will be paid a cash settlement for the money he would have earned if he had worked.

At the time of the semi-annual audit, if it is determined an employee or employees are out of contract with their overtime, the Company will make up this overtime within thirty (30) days using the same rules established in this Section.

EXHIBIT D

AGREEMENT

In accordance with Article 28.2 of the current Labor Agreement by and between Cummins Engine Company, Inc., and the Diesel Workers' Union, the parties agree to the following modification of the Labor Agreement for the purpose of complying with Federal Law.

Employees who are members of a reserve component of the Armed Forces of the United States will not be charged with an overtime opportunity if the reason for declining the overtime is due to a requirement that the employee attend a meeting of his/her Reserve Unit which is to be held on the overtime day in question. An "M" symbol will be entered on the appropriate overtime roster and no cumulative increase will be charged to the employee.

It is further agreed that this procedure shall not result in an out-of-contract situation subject to make-up or payment as defined in Appendix I, Section 29, of the current Labor Agreement but shall be subject to make-up as opportunities occur.

/s/ C. R. PROFFITT — 7-17-75
C. R. Proffit — Date
Manager-Columbus Employees Relations

/s/ I. C. FLEETWOOD — 7-17-75
I. C. Fleetwood — Date
President-Diesel Worker's Union

(2) This paragraph extends to persons entering upon active duty subsequent to June 24, 1948, other than for the purpose of determining physical fitness, whether or not voluntarily the same reemployment rights and benefits upon relief from active duty under honorable conditions as are provided for persons inducted or enlisted in the Armed Forces.

(3) Reinstatement rights for persons rejected for military service.—This proposal gives for the first time reinstatement rights to those persons who leave private or Federal employment to enter the Armed Forces, but who are rejected by such forces. As written, the proposed legislation provides these reinstatement rights shall also be applicable to persons who leave private or Federal employment for the purpose of induction into, entering, determining their physical fitness to enter, or performing training duty in, the Armed Forces. The proposed legislation provides for the reinstatement of such persons provided they make application within 30 days following release.

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(f) Reemployment rights for trainees

Present law.—The 1951 amendments to the Selective Service Act of 1948 provide reemployment rights for enlistees, inductees, and reservists who are on active duty, and leave-of-absence rights for persons on training duty, such as the usual two-weeks summer encampment. There is no provision, however, for appropriate reemployment rights to be granted to persons enrolled in training programs contemplated by the amendments under consideration in this bill.

What the bill does.—This subsection of the bill therefore adds to section 9 of the Universal Military Training and Service Act authority whereby persons performing active duty for training for the period authorized in the bill would receive substantially the same reemployment rights as persons on active duty, except that they would be required to apply for reinstatement within 60 days from date of their release from training or date of release from hospitalization immediately following discharge, such period of hospitalization not to exceed 6 months, and, upon reinstatement by his employer, the trainees would be protected against discharge without cause for a period of only 6 months.

These provisions of the bill fit the trainee into the general pattern of reemployment rights guaranteed prior-service men and insure that such rights shall be commensurate with their period of duty. As an example, the bill provides that the trainees shall apply for reinstatement within 60 days from date of release from training; the comparable period for inductees and reservists on active duty is 90 days Similarly, the 6-month trainee receives protection against discharge for a period of

6 months after he returns to his civilian position; the comparable period for inductees and reservists on active duty is 1 year.

As to the necessity of providing reemployment protection to individuals in the age group to be participating in the 6-month program, census figures show that in October 1954, 37.6 percent of the 16- and 17-year age group, 60 percent of the 18- and 19-year age group, and 76.7 percent of the 20- to 24-year age group had some kind of employment. It is noted that this will not be the only age group affected by the reemployment provisions. The group most affected will probably be the "critical skills" group engaged in defense-supporting industries and research.

The National Guard and the Air National Guard are not included in the provisions of this paragraph of the bill.

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1960 U. S. CONG. & ADMIN. NEWS

Military Training—Reemployment

For text of Act see p. 531

Senate Report No. 1672, June 23, 1960
[To accompany H. R. 5040]

House Report No. 1263, Feb. 11, 1960
[To accompany H. R. 5040]

The Senate Report is set out.

Senate Report No. 1672

THE Committee on Armed Services, to whom was referred the bill (H. R. 5040) to amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert an amendment in the nature of a substitute.

PURPOSE OF THE BILL

The purposes of this bill, as amended, are: (1) To extend to members of the National Guard who perform 3 to 6 months of active duty for training the same reemployment rights available to members of the Ready Reserve performing the same type and length of training; and (2) to adjust the time period within which leave of absence rights must be asserted after the performance of inactive duty for training, active duty for training other than an initial period of 6 months of active duty for training, and after being examined for induction.

Equalizing National Guard reemployment rights

The Reserve Forces Act of 1955 authorized a new training program under which persons entering the Reserve would perform an initial period of active duty for training of 3 to 6 months in duration and then would participate actively in Reserve units. Reemployment rights covering the initial period of active duty for training under this program were provided in a specific section of the 1955 act that became section 262(f) of the Armed Forces Reserve Act of 1952. Under this section persons that enlist in the Reserve for the 6-month training program have reemployment rights and job protection for 6 months if they apply within 60 days after release from this initial period of active duty for training.

Under other provisions of law, members of the National Guard may perform the same type and length of active duty for training as is performed under the 6-month training program by members of the Reserve. National Guard members performing such training have reemployment rights under section 9(g) (3) of the Universal Military Training and Service Act. These rights are more accurately called leaves-of-absence than reemployment rights. They must be asserted within 30 days and they do not afford the job protection for 6 months that reservists have under section 262(f) of the Armed Forces Reserve Act of 1952. Hence there is a significant difference in the rights of members of the Reserve and those of members of the National Guard performing exactly the same type and length of active duty for training.

The proposed solution is to repeal the section now conferring reemployment rights only on reservists in the 6-month training program and to enact a new provision applicable both to reservists and to members of the National Guard performing an initial period of active duty for training of 3 to 6 months in duration. Under the new provision both reservists and members of the National Guard performing this initial period of active

duty for training would have reemployment rights and job protection for 6 months after restoration if they apply within 31 days after release from the satisfactory performance of this training duty. For those persons who undergo hospitalization incident to the training, the reemployment rights must be asserted within 31 days after discharge from hospitalization or within 31 days after 1 year following their scheduled release from such training, whichever is earlier.

Adjustment of time period for asserting rights

Section 9(g)(3) of the Universal Training and Service Act now provides reemployment rights that are essentially leaves of absence for persons who perform training duty in or who are being examined to determine their fitness to enter the Armed Forces. After release from training duty or rejection for service, the employee must apply for reinstatement within 30 days following his release.

This section was designed to provide reemployment protection for trainees who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training or instruction periods that may last for 30, 60, or 90 days.

A period of 30 days within which to assert leave of absence rights by persons performing inactive duty training such as an armory drill of 2 hours is unrealistic. The amended bill proposes substitution of new provisions requiring that persons covered by this section shall upon request be granted a leave of absence for the period required to report for the purpose of being inducted into, entering, determining their physical fitness to enter, or performing active duty for training or inactive duty training in the Armed Forces of the United States. These employees must be permitted to return to their positions with the same seniority, status, pay, and vacation as they would have had if they had not been absent for these purposes. To be entitled to reinstatement

with the same seniority, status, pay, and vacation rights, the employee must report for work at the beginning of his next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training or rejection to the place of employment, unless a delayed return is caused by conditions over which the employee has no control. If the employee were hospitalized because of the training or rejection, he would be required to report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of discharge from hospitalization to the place of employment, or within 1 year after his rejection or release from training whichever is earlier.

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1968 U. S. CONG. & ADMIN. NEWS

Servicemen—Re-Employment

P. L. 90-491, see page 913

House Report (Armed Services Committee) No. 1303, Apr. 24, 1968 [To accompany H. R. 1093]

Senate Report (Armed Services Committee) No. 1477, July 26, 1968 [To accompany H. R. 1093]

Cong. Record Vol. 114 (1968)

Dates of Consideration and Passage

House May 6, July 31, 1968

Senate July 29, Aug. 2, 1968

The Senate Report is set out.

SENATE REPORT NO. 1477

The Committee on Armed Services, to which was referred the bill (H. R. 1093) to amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

Purpose

This bill is intended (1) to prevent reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership; and (2) to extend the period of active duty certain reservists or enlistees can perform without losing their reemployment rights.

Explanation

Protection for Employees with Obligations as Members of a Reserve Component of the United States

Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and other have been discharged because of these obligations. Section 1 of the bill is intended to protect members of the Reserve components of the Armed Forces from such practices. It provides that these reservists will be entitled to the same treatment afforded their coworkers not having such military obligations by requiring that employees with Reserve obligations "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces of the United States." Section 2 of the bill provides that the prohibition against discrimination toward employees with Reserve obligations would be enforcible in the U. S. district courts under section 9(g) of the Military Selective Service Act of 1967.

Reemployment Rights for Additional Military Service

Under existing law the general rule is that enlistees and reservists can assert reemployment rights upon release from active duty if that active duty after August 1, 1961, does not exceed 4 years. For enlistees this 4-year period is extended by any period of additional service imposed pursuant to law (involuntary extension). For reservists this 4-year period is extended by any additional period for which they are unable to obtain orders relieving them from active duty.

This bill would provide reemployment rights for enlistees whose service after August 1, 1961, is as long as 5 years, if the

service longer than 4 years is at the request, and for the convenience, of the Federal Government. This part of the bill is intended to cover those enlistees who voluntarily extend their enlistments in response to a request from the Government to do so. Similarly this bill would provide reemployment rights for reservists whose service after August 1, 1961, is for more than 4 years if such additional service (1) occurs during a period when the President is authorized to order the Ready Reserve to active duty; (2) is not longer than the period for which the President is authorized to order the Reserve to active duty; and (3) is at the request, and for the convenience, of the Federal Government in the case of those reservists who voluntarily enter upon or extend their active duty.

Under the authority of Public Law 89-687, 33,612 members of the Reserve and National Guard have been ordered to active duty. The estimate is that about one-third of these reservists and guardsmen have served on active duty for longer than 2 years since August 1, 1961. If the service of these reservists and guardsmen during the current tour of active duty is for longer than 2 years, their right to reemployment is questionable without the extension this bill would authorize.

Approval of this bill should avoid the necessity for considering new legislation each time reservists or guardsmen are ordered to active duty or when a branch of the Armed Forces finds it to be in the national interest to request voluntary extensions of service for a reasonable period or to encourage voluntary reentry on active duty for a reasonable period. In the absence of a new national emergency or declaration of war the maximum period of additional coverage for reservists will be 2 years. Members of the Armed Forces other than reservists would be limited to a 12-month period of additional coverage for reemployment rights as a result of voluntary or involuntary extensions of enlistments for the convenience of the Government.

Elimination of Overlapping Coverage

The committee has added a new section 2 to the bill as a result of its attention being called to the existence of a provision of law, section 3551, title 5, United States Code, that overlaps the reemployment provisions contained in section 9(g) of the Military Selective Service Act of 1967. Although section 9(g) of the Military Selective Service Act of 1967 imposes limits on the time a person may serve on active duty without relinquishing reemployment rights, section 3551 of title 5, United States Code, apparently gives Government employees and employees of the District of Columbia an unqualified right of restoration to their jobs upon release from active duty, irrespective of how long they have been on active duty. Consequently the Comptroller General was required to hold recently that a former employee of the Civil Aeronautics Authority was entitled to back pay as a consequence of a failure to reemploy him promptly under section 3551 of title 5, United States Code, after he had served more than 12 years on active duty and had been retired for length of service. Such a requirement obviously was unintended and the committee has amended section 3551 to limit the time that reservists and National Guardsmen who are Government employees and employees of the District of Columbia may serve without losing reemployment rights. This time limit is the same as that which applies to other persons under section 9(g) of the Military Selective Service Act of 1967.

Section 3551 of title 5, United States Code, also conflicts with the provisions of section 9(g) of the Military Selective Service Act of 1967 (50 U. S. C. App. 459(g)) as they relate to the reemployment rights of certain employees of the House and Senate. Section 9(g) of the Military Selective Service Act of 1967 provides that Government employees who have served not longer than the specified periods and who make timely application are entitled to be restored to the position they left to perform military duty or to a position of like seniority status and

pay. In any case in which it is not possible for any such person to be restored to a position in the legislative branch of the Government and he is otherwise eligible to acquire civil service status, the U. S. Civil Service Commission can restore such person to an appropriate position in the executive branch of the Government if there is such a position available for which the person is qualified. In contrast, section 3551 of title 5 appears to grant an unqualified right to restoration to the former legislative job, without providing the alternative of restoration to a position of like seniority status and pay, or the alternative of possible employment in the executive branch when there are no positions of like seniority status and pay available in the Senate or in the House of Representatives. Hence the committee recommends a further amendment to section 3551 of title 5 to make clear that employees of the House and Senate do not have an unlimited right of restoration to their former jobs after active duty and that their rights of restoration are limited to those provided by section 9(g) of the Military Selective Service Act of 1967.

Present Reemployment Provisions Contained in Military Selective Service Act of 1967

Ex-serviceman

An ex-serviceman is eligible for reemployment when [1]—

He left an other than temporary position with a private employer or the Federal Government to enter the Armed Forces;

He performed satisfactory service;

His service was not in excess of 4 years between June 24, 1948, and August 1, 1961, and not in excess of 4 years after August 1, 1961, unless involuntarily retained;[2]

He applies for reinstatement within the prescribed time limits—

Within 90 days after release from active duty;

Within 31 days after release from initial active duty for training of not less than 3 months;

On the next regularly scheduled work period following other types of training duty, an absence for induction or examination, or after rejection.

Employer

The employer is obligated to reemploy the ex-serviceman[3]—

1. The serviceman returning from active duty or from training duty of more than 3 months should be qualified to perform the duties of the position to which he returns, except that a disabled returnee may be entitled to the nearest comparable job he can perform.

2. Only active military service from employment to which restoration is claimed is to be included in computing service time to determine the 4-year limitation.

3. If the employer's circumstances have changed so as to make it impossible or unreasonable to reemploy the ex-serviceman, these conditions do not apply.

In the position he would have had if he had remained on the job instead of entering military service; and

With no loss of seniority (where a training program requirement and the training period is completed, his seniority is adjusted to include time spent in military service); and

The employer may not discharge him without cause for the period specified in the law.[4]

Reemployment Rights and Job Protection

Set out below in summary form is a table outlining the statutory protection provided the various categories of personnel, both on reemployment rights and job protection, under present law together with the changes that would be effected under the provisions of this bill, H. R. 1093, as amended.

(Table has been reprinted on Pages A50 & A51.)

4. Protection against discharge is 1 year for the serviceman returning from active duty, and 6 months for the reservist returning from an initial active duty for training.

Cost

Enactment of this bill will not result in any increased cost to the Federal Government.

Legislative Reference

A companion bill, S. 2561, has been introduced by the junior Senator from West Virginia, Mr. Byrd.

Departmental Recommendation

This bill is a legislative proposal of the Department of Labor that is supported by the Department of Defense.

* * * * *

SERVICEMEN—RE-EMPLOYMENT

REEMPLOYMENT RIGHTS AND JOB PROTECTION

Duty period provided in orders	Category of personnel	Section granting protection under Universal Military Training and Service Act, as amended	Present law: Maximum periods of military service	Present law: Job protection	H. R. 1093: Additional military service	H. R. 1093: Job protection
Extended active duty for training and service.	Inductee	9(b)	4 years between June 24, 1948, and Aug. 1, 1961; and 4 years after Aug. 1, 1961.	1 year	1 year if at the request of and for the convenience of Federal Government.	No change.
	Enlistee	9(g)(1)		do		Do.
	Reservist	9(g)(2)		2 years		Increased 1 year.
	National Guard	9(g)(2)		do		Do.
Initial active duty for training of not less than 3 consecutive months.	Reservist	9(g)(3)	Not applicable	6 months	No change	No change.
	National Guard	9(g)(3)	do	do	do	Do.
Other types of active duty for training or inactive duty training (drills).	Reservist	9(g)(4)	do	None	Not applicable	Discharge from or discrimination in employment because of membership in reserve or National Guard prohibited.
	National Guard	9(g)(4)	do	None	do	

Note: In addition to the above, any person who leaves a position to report for induction into, entering or determining his fitness to enter the Armed Forces, or who is rejected, is entitled to reemployment under sec. 9(g)(5) of the Universal Military Training and Service Act, as amended.

90th Congress *2d Session* Report No. 1303

HOUSE OF REPRESENTATIVES

AMENDING AND CLARIFYING THE REEMPLOYMENT RIGHTS OF INDIVIDUALS WHO PERFORM MILITARY SERVICE

April 24, 1968.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Price of Illinois, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H. R. 1093]

The Committee on Armed Services, to whom was referred the bill (H. R. 1093) to amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

1. On page 2 of the bill delete lines 4 and 5 in their entirety and substitute the following:

> (2) Amend subsection 9(d) by inserting ", subsection (c)(3)" immediately following the words "subsection (c)(1)".

2. On page 2 of the bill beginning on line 21 and extending through line 15 on page 3 of the bill delete subsection 4 in its entirety and substitute the following in lieu thereof:

(4) Amend subsection 9(g)(2) to read as follows:

(2)(A) Any person who, after entering the employment to which he claims restoration enters upon active duty (other than for the purpose of determining his physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon his relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided by this section in the case of persons inducted under the provisions of this title, if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which he was unable to obtain orders relieving him from active duty).

(B) Any member of a reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining his physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under paragraph (2)(A) of this subsection extended by his period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units oi the Ready Reserve or members of a reserve component; *Provided,* That with respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended the provisions of this paragraph shall apply only when such additional active duty is

at the request and for the convenience of the Federal Government.

Explanation of the Amendments

The first amendment recommended by the Department of Labor and accepted by the committee is essentially technical in nature. The amendment strikes the existing language in subsection 2 of the bill and substitutes new language designed to more clearly identify those provisions in subsection 9(c) of the act which are specifically and independently enforceable by the courts.

The second amendment, also recommended by the Department of Labor, effects a substantive change in the bill.

Under existing law, veterans are provided reemployment rights for a maximum period of 4 years of military service performed after August 1, 1961. Subsection 4 of H. R. 1093 as introduced, would have expanded this coverage by a period not to exceed 12 additional months whenever servicemen who, at the request of and for the convenience of the Government, voluntarily or involuntarily perform additional military service. However, recent events have demonstrated that this additional period of coverage will be inadequate if reservists who have now been involuntarily ordered to active duty are required to perform the total 24 months of service authorized under Public Law 89-687.

The Department of Labor has therefore recommended, and the committee has approved, substitute language for the existing subsection 4 which would provide the necessary flexibility to cover the existing and foreseeable situations involving our Reserve components.

Thus to recapitulate: Subsection (A) of the proposed amendment is merely a restatement of existing law; while subsection (B) provides flexibility in covering periods of involuntary service for Reserve personnel.

Purpose of the Proposal

The purpose of H. R. 1093, as amended, is threefold:

1. It amends section 9(c) of the Selective Service Act to protect reservists and guardsmen from being disadvantaged in employment because of their military obligations.

2. It amends section 9(d) to extend the court enforcement provisions to the newly protected reservists and guardsmen.

3. It amends subsection 9(g)(1) and (2) to provide reemployment rights for servicemen who, at the request and for the convenience of the Government, voluntarily or involuntarily serve their country for a period beyond the present 4-year period for which reemployment rights are normally given.

Explanation of the Bill, as Amended

1. Job Protection for Employees with Obligations as Members of a Reserve Component of the United States

Employment practices which disadvantage employees with Reserve obligations have become an increasing problem in recent years. Section (1) of the bill will protect members of Reserve components of the Armed Forces from such practices. It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligations, by requiring that they "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States."

Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] solely because of such Reserve affiliation.

It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligation.

The law does not now protect these reservists against discharge without cause, as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.

2. Extension of Enforcement Provisions to Newly Protected Reservists

Section (2) of the bill provides that the protection granted reservists and guardsmen under section 9(c)(3) will be enforceable under section 9(d) of the Selective Service Act.

Section (2) of the bill is intended to clarify the application of section 9(d) of the Selective Service Act, which provides for court enforcement of reemployment rights and representation by the U. S. attorney in enforcement proceedings.

The original language in H. R. 1093 proposed to clarify this matter by deleting from the language in section 9(d) the existing reference to "subsection 9(c)(1)" and substituting language which simply embraced all of section 9(c). Thus, the right of the courts to enforce all of 9(c) would be clear. However, since subsection 9(c)(2) merely reflects a "sense of Congress" resolution relative to reemployment rights, it is not therefore independently enforceable as a statutory right. Therefore, it is necessary to exclude 9(c)(2) when making reference to those sections of 9(c) which are each subject to the specific enforcement rights outlined in section 9(d). However, since the "sense of Congress" language in 9(c)(2) has been construed by the courts as enforceable when used to clarify the provision of 9(c)(1), it is evident that, as a practical matter, the distinction which requires the amendment is simply a "technical" detail and effects no substantive change in the act.

3. Reemployment Rights for Additional Military Service

The third and fourth sections of the bill amending subsection 9(g)(1) and (2) of the act have been amended in accordance

with the recommendation of the Department of Labor. The amended language provides permanent flexibility in times of emergency. It provides an extension of the 4-year service limitation for reemployment rights equal to the additional service that may be required of members of the Ready Reserve and National Guard whose units have been ordered to active duty. Without this change, any of the reservists who had recently been ordered involuntarily to active duty who had previously served on active duty for 4 years after August 1, 1961, would have no reemployment rights when they return from their present tours of duty.

Thus, under the original language of H. R. 1093, these reservists would have been given an additional 12 months' extension of reemployment rights beyond the 4-year period. However, since these reservists may be required to complete 2 years of extended active duty pursuant to the provisions of Public Law 89-687, the need for a more flexible protective provision is apparent. Enactment of this new language will preclude the necessity to seek new legislation each time reservists or guardsmen are called to the colors or when a branch of the armed service finds it to be in the national interest to request voluntary extension of service for a reasonable period or to encourage voluntary reentry on active duty for a reasonable period, and for the convenience of the Government. The amendment further provides that the period of additional coverage will not "exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a reserve component." Thus, in the absence of a new national emergency or declaration of war, the maximum period of additional coverage for reservists will be 2 years (sec. 4 of amended bill).

On the other hand, personnel other than those in a Reserve component, would be limited to a 12-month period of additional coverage on reemployment rights to cover involuntary or voluntary extensions of enlistments, etc., of personnel in the Regular components, for the convenience of the Government (sec. 3 of amended bill).

Present Reemployment Provisions Contained in the Military Selective Service Act of 1967

Ex-serviceman

An ex-serviceman is eligible for reemployment when[1]—

He left an other than temporary position with a private employer or the Federal Government to enter the Armed Forces;

He performed satisfactory service;

His service was not in excess of 4 years between June 24, 1948, and August 1, 1961, and not in excess of 4 years after August 1, 1961, unless involuntarily retained;[2]

He applies for reinstatement within the prescribed time limits—

Within 90 days after release from active duty;

Within 31 days after release from initial active duty for training of not less than 3 months;

On the next regularly scheduled work period following other types of training duty, an absence for induction or examination, or after rejection.

Employer

The employer is obligated to reemploy the ex-serviceman[3]—

In the position he would have had if he had remained on the job instead of entering military service; and

1. The serviceman returning from active duty or from training duty of more than 3 months should be qualified to perform the duties of the position to which he returns, except that a disabled returnee may be entitled to the nearest comparable job he can perform.

2. Only active military service from employment to which restoration is claimed is to be included in computing service time to determine the 4-year limitation.

3. If the employer's circumstances have changed so as to make it impossible or unreasonable to reemploy the ex-serviceman, these conditions do not apply.

With no loss of seniority (where a training program requirement and the training period is completed, his seniority is adjusted to include time spent in military service; and

The employer may not discharge him without cause for the period specified in the law.[4]

Reemployment Rights and Job Protection

Set out below in summary form is a table outlining the statutory protection provided the various categories of personnel, both on reemployment rights and job protection, under present law together with the changes that would be effected under the provisions of this bill, H. R. 1093, as amended.

4. Protection against discharge is 1 year for the serviceman returning from active duty, and 6 months for the reservist returning from an initial active duty for training.

REEMPLOYMENT RIGHTS AND JOB PROTECTION

Duty period provided in orders	Category of personnel	Section granting protection under Universal Military Training and Service Act, as amended	Present law: Maximum periods of military service	Present law: Job protection	H. R. 1093: Additional military service	H. R. 1093: Job protection
Extended active duty for training and service.	Inductee	9(b)	4 years between June 24, 1948, and Aug. 1, 1961; and 4 years after Aug. 1, 1961.	1 year	1 year if at the request of and for the convenience of Federal Government.	No change.
	Enlistee	9(g)(1)		.. do		Do.
	Reservist	9(g)(2)		2 years		Increased 1 year.
	National Guard	9(g)(2)		.. do		Do.
Initial active duty for training of not less than 3 consecutive months.	Reservist	9(g)(3)	Not applicable	6 months	No change	No change.
	National Guard	9(g)(3)	..... do	..... do	..... do	Do.
Other types of active duty for training or inactive duty training (drills).	Reservist	9(g)(4)	..... do	None	Not applicable	Discharge from or discrimination in employment because of membership in reserve or National Guard prohibited.
	National Guard	9(g)(4)	..... do	None	..... do	

Note: In addition to the above, any person who leaves a position to report for induction into, entering or determining his fitness to enter the Armed Forces, or who is rejected, is entitled to reemployment under sec. 9(g)(5) of the Universal Military Training and Service Act, as amended.

Fiscal Data

Enactment of this proposal as amended will not result in any increased cost to the Federal Government.

Departmental Position

The Department of Labor recommends enactment of this legislation, as is evidenced by the communication sent to the Congress dated April 13, 1967. A copy of this communication is set out below and hereby made a part of this report.

U. S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, D. C., April 13, 1967.

HON. JOHN W. MCCORMACK,
Speaker of the House of Representatives,
Washington, D. C.

HON. HUBERT H. HUMPHREY,
President of the Senate,
Washington, D. C.

DEAR MR. SPEAKER (DEAR MR. PRESIDENT): I am transmitting a draft bill to amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes. The bill is designed to improve the existing reemployment provisions of the act. The manner in which this would be achieved is discussed in the enclosed explanatory statement.

This proposal is part of the legislative program of the Department of Labor, and we have been advised by the Bureau of the Budget that there is no objection to this submission from the standpoint of the administration's program.

Sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

Explanatory Statement of Bill to Amend the Universal Military Training and Service Act

The purpose of the bill is threefold: First, it amends section 9(c) of the UMTSA to protect reservists and guardsmen *from being disadvantaged* in employment because of their military obligations. Second, it amends section 9(d) to extend the court enforcement provisions to the newly protected reservists and guardsmen. Third, it amends subsections 9(g)(1) and (2) to provide reemployment rights for servicemen who, at the request and for the convenience of the Government, voluntarily or involuntarily serve their country for a period not to exceed 12 additional months beyond the present 4-year period for which reemployment rights are normally given.

Job protection for employees with obligations as members of a Reserve component of the United States

Employment practices which disadvantage employees with Reserve obligations have become an increasing problem in recent years. Paragraph (1) of the bill will protect members of Reserve components of the Armed Forces from such practices. It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligations, by requiring that they "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States."

Extension of enforcement provisions to newly protected reservists

Paragraph (2) of the bill provides that the protection granted reservists and guardsmen under section 9(c)(3) will be enforceable under section 9(d) of the UMTSA.

Military personnel who voluntarily or otherwise extend their tour of duty at the request of and for the convenience of the Government

Under subsection 9(g)(1) and (2) of the UMTSA, a serviceman loses his reemployment rights if his period of active duty after August 1, 1961, exceeds 4 years. Paragraphs (3) and (4) of the bill amend these provisions to provide that a serviceman may serve up to 5 years on active duty without losing his reemployment rights, if the service in excess of 4 years is at the request and for the convenience of the Government.

These amendments are needed to cover urgent situations in which the Government may find it necessary to request enlistments and extensions of tours of duty or reentry on active duty. At the present time, a serviceman who responds to such a request and extends his period of active duty beyond 4 years loses his reemployment rights. They would also protect reservists who are involuntarily recalled from civilian life to active duty to the same extent as those whose period of active duty is voluntarily extended.

The amendments will provide the flexibility which is needed to deal with special and urgent situations. It will permit the Government when the need arises, to request voluntary extensions of enlistments and extensions of tours of active duty or reentry on active duty at a minimum of personal sacrifices to those who respond to the request. Such persons would be assured beforehand that they could serve up to an additional 12 months beyond the present limitation on total service of 4 years after August 1, 1961, without impairing their reemployment rights. Protection would also be accorded to persons who have already responded to such a request, and are released after the effective date of the amendments. This approach will alleviate the need for special legislation to protect reemployment rights each time that a branch of the armed services finds it necessary to obtain or retain additional personnel.

The bill makes no changes in the existing provisions of 9(g)(1) and (2) which protect a serviceman's reemployment rights when he is required to serve an additional period imposed by law or when he is unable to obtain orders relieving him from active duty.

Background

This bill is virtually identical to H. R. 11509, which was cleared by the Bureau of the Budget and passed by the House but not the Senate during the last Congress. The only difference in the two bills is that under the present bill the "sense of Congress" provision (9(c)(2)) would not be independently enforceable through 9(d). Under the Supreme Court's reading of subsection 9(c)(2) in *Tilton* v. *Missouri Pacific Railroad Company*, 376 U.S. 171, and cases cited therein, there is no need to make 9(c)(2) independently enforceable through 9(d) in order for the Department to effectively administer the Act.

The Department of Defense wishes to have the bill introduced.

Committee Position

The Committee on Armed Services, a quorum being present unanimously recommends enactment of H. R. 1093, as amended.

89TH CONGRESS *2d Session* REPORT No. 1303

HOUSE OF REPRESENTATIVES
CLARIFYING REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT

March 1, 1966.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Price, from the Committee on Armed Services, submitted the following

REPORT

[To accompany H. R. 11509]

The Committee on Armed Services, to whom was referred the bill (H. R. 11509) to amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Purpose of the Proposed Legislation

The purpose of the proposed legislation is to clarify and strengthen the existing reemployment provisions of the Universal Military Training and Service Act.

This purpose will be accomplished by a threefold change in the law as follows:

First, it amends section 9(c) of the Universal Military Training and Service Act to protect reservists and guardsmen from being disadvantaged in employment because of their military obligations.

Second, it amends section 9(d) to make it clear that there is to be no distinction in the court enforcement of the provisions of sections 9(c)(1) and (2).

Third, it amends sections 9(g)(1) and (2) to provide reemployment rights for servicemen who, at the request and for the convenience of the Government, voluntarily or involuntarily serve their country for a period not to exceed 12 additional months beyond the present 4-year period for which reemployment rights are normally given.

Background

As the Members of the House are aware, the Congress has since 1940 included in its selective service legislation appropriate provisions protecting the reemployment rights of veterans. The principle underlying this legislation is that he who is "called to the colors (is) not to be penalized on his return by reason of his absence from his civilian job." (*Fishgold* v. *Sullivan Drydock and Repair Corporation,* 328 U. S. 275.) These provisions of law are therefore designed to guarantee to active and inactive duty service personnel alike reemployment rights and job protection.

Generally speaking, individuals who enter on active duty either voluntarily or involuntarily and serve for a period not to exceed 4 years will, upon their return to civilian life, be entitled to return to their previous position of employment without having been penalized in the interim because of their military absence.

The reemployment provisions of existing law are summarized below in general terms as they affect both the ex-serviceman and his employer:

Present Reemployment Provisions Contained in the Universal Military Training and Service Act

Ex-serviceman

An ex-serviceman is eligible for reemployment when[1]—

He left an other than temporary position with a private employer or the Federal Government to enter the Armed Forces;

He performed satisfactory service;

His service was not in excess of 4 years between June 24, 1948 and August 1, 1961, and not in excess of 4 years after August 1, 1961, unless involuntarily retained;[2]

He applies for reinstatement within the prescribed time limits—

Within 90 days after release from active duty;

Within 31 days after release from initial active duty for training of not less than 3 months;

On the next regularly scheduled work period following other types of training duty, an absence for induction or examination, or after rejection.

Employer

The employer is obligated to reemploy the ex-serviceman[3]—

In the position he would have had if he had remained on the job instead of entering military service; and

1. The serviceman returning from active duty or from training duty of more than 3 months should be qualified to perform the duties of the position to which he returns, except that a disabled returnee may be entitled to the nearest comparable job he can perform.

2. Only active military service from employment to which restoration is claimed is to be included in computing service time to determine the 4-year limitation.

3. If the employer's circumstances have changed so as to make it impossible or unreasonable to reemploy the ex-serviceman, these conditions do not apply.

With no loss of seniority (where a training program requirement and the training period is completed, his seniority is adjusted to include time spent in military service); and

The employer may not discharge him without cause for the period specified in the law.[4]

Explanation of the Bill

1. *Job protection for employees with obligations as members of a reserve component of the United States*

Employment practices which disadvantage employees with Reserve obligations have become an increasing problem in recent years. Paragraph 1 of the bill will protect members of the Reserve components of the Armed Forces, including the National Guard, from such practices. It is designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not participate in the Reserve program and do not have a Reserve obligation.

It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligations by requiring that they "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces of the United States."

The law does not now protect these reservists against discharge without cause as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.

To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position

4. Protection against discharge is 1 year for the serviceman returning from active duty, and 6 months for the reservist returning from an initial active duty for training.

indefinitely. The new section 9(c)(3), which the proposed amendments would add to the act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces.

The term "obligated service" not only includes the statutory 6-year period of the Reserve obligation but also includes obligations voluntarily entered into by reservists who execute a Ready Reserve agreement.

If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible.

2. *Clarification regarding court enforcement of reemployment rights and representation by U. S. attorney.*

Paragraph 2 of the bill clarifies the application of section 9(d) of the Universal Military Training and Service Act, which provides for court enforcement of reemployment rights and representation by the U. S. attorney in enforcement proceedings.

The courts have made it clear that section 9(d) applies without distinction to the reemployment rights set forth in both sections 9(c)(1) and (2), even though section 9(d) now makes reference only to section 9(c)(1). The amendment will remove any possible doubt as to the application of sections 9(d) to (c)(2). It will also make section 9(d) applicable to the reemployment rights created by paragraph 1 of the bill, which protects members of Reserve components of the Armed Forces from being disadvantaged in employment because of any obligation as such members.

3. *Military personnel who voluntarily or otherwise extend their tour of duty at the request of and for the convenience of the Government.*

The third and fourth provisions of the bill amending subsections 9(g)(1) and (2) of the act are particularly important.

The changes are particularly pertinent at this time because of the action taken by the Department of the Navy and Marine Corps in urging personnel to voluntarily extend their enlistments during the present Vietnamese crisis.

The law, as amended, now does provide a continuation of reemployment rights for those personnel who are *involuntarily extended* past the 4-year service point (Public Law 87-391). However, no similar provision applies to those young men who have voluntarily responded to the Secretary of the Navy's request that they help meet the Navy's critical manpower requirements by *voluntarily extending* their period of service beyond their 4-year enlistment. As a consequence, many naval personnel today have unwittingly lost their reemployment rights by voluntarily extending their enlistment beyond the 4-year point of service. This legislation will correct this situation.

While the Navy and Marine Corps have legal authority to involuntarily extend the service of certain personnel and those who extend under this authority for an aggregate of more than 4 years will have reemployment rights protection, no other branch of the service has this authority. Any extension would be voluntary and those extending for more than 4 years would forfeit their reemployment rights unless section 9(g)(1) of the law is amended. Also, reservists encouraged to voluntarily reenter on active duty in any branch of the service will forfeit their reemployment rights if the aggregrate of their service after August 1, 1961, exceeds 4 years, unless section 9(g)(2) of the law is amended.

The reemployment rights provisions of the act should be amended to provide permanent flexibility in times of urgency.

It should not be necessary to seek new legislation each time a branch of the armed services finds it to be in the national interest to request *voluntary extension* of service for a reasonable period or to encourage *voluntary reentry* on active duty for a reasonable period. This bill, H. R. 11509, provides this flexibility.

Under the bill, subsections 9(g)(1) and (2) would retain the 4-year limitation, but on the request and for the convenience of the Government additional service or active duty not to exceed 12 months could be performed without forfeiting reemployment rights. A serviceman could not serve for more than 4 years solely for his own convenience nor could a reservist return to active duty solely for his own convenience and retain his reemployment rights if his active duty exceeds 4 years.

Summary of existing law and proposed changes to existing law

Set out below in tabular form is a resume as it affects inductees, enlistees, reservists and National Guard personnel under the various circumstances under which they may engage in active duty, active duty for training, or inactive duty training (drills). In addition, the table reflects the proposed amendments to the law as contained in H. R. 11509. It should be noted that the only substantive changes in existing law relate to the additional period of military service which would be covered and the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs.

REEMPLOYMENT RIGHTS AND JOB PROTECTION

Duty period provided in orders	Category of personnel	Section granting protection under Universal Military Training and Service Act	Present law: Maximum periods of military service	Present law: Job protection	H. R. 11509: Additional military service	H. R. 11509: Job protection
Extended active duty for training and service.	Inductee	9(b)	4 years between June 24, 1948, and Aug. 1, 1961; and 4 years after Aug. 1, 1961.	1 year	1 year if at the request of and for the convenience of Federal Government.	No change.
	Enlistee	9(g)(1)		do		Do.
	Reservist	9(g)(2)		do		Do.
	National Guard	9(g)(2)		do		Do.
Initial active duty for training of not less than 3 consecutive months.	Reservist	9(g)(3)	Not applicable	6 months	No change	Do.
	National Guard	9(g)(3)	do	do	do	Do.
Other types of active duty for training or inactive duty training (drills).	Reservist	9(g)(4)	do	None	Not applicable	Discharge from or discrimination in employment because of membership in reserve or National Guard prohibited.
	National Guard	9(g)(4)	do	None	do	

Note: In addition to the above, any person who leaves a position to report for induction into, entering or determining his fitness to enter the Armed Forces, or who is rejected, is entitled to reemployment under sec. 9(g)(5) of the Universal Military Training and Service Act.

Reemployment Rights of Federal Employees

As previously indicated in this report, job restoration rights are now provided to cover a maximum period of 4 years of active duty and would, under this enactment, be extended another 12 months, providing that the service in excess of 4 years is at the request and for the convenience of the Government.

The provisions of law which provide these job restoration guarantees are contained in section 9(g)(2) of the Universal Military Training and Service Act, as amended. Therefore, the changes recommended by this bill to provide extended job restoration rights will be incorporated in the Universal Military Training and Service Act.

Unfortunately, there is contained in title 5 of the United States Code, section 30r(b), language concerning the job restoration rights of reservists and National Guard personnel who are Federal employees, which language appears somewhat inconsistent with the provisions of section 9(g)(2) of the Universal Military Training and Service Act.

Specifically, the language of 5 U. S. C. 30r(b) would appear to provide no time limitation on the job restoration right of Federal employees, whereas all other National Guard and Reserve personnel, not Federal employees, have the time limitations contained in the Universal Military Training and Service Act.

The Chairman of the U. S. Civil Service Commission, by letter to the Committee on Armed Services dated March 31, 1964, made the following observations in connection with this apparent inconsistency in the law:

> DEAR MR. CHAIRMAN: This is in further reference to your letter of January 3, 1964, requesting the Commission's views on questions raised by the Comptroller General in his letter of December 30, 1963.
>
> The first point raised by the Comptroller General is with respect to an inconsistency between the provisions of

5 U. S. C. 30r(b) and section 9(g)(2) of the Universal Military Training and Service Act, 50 U. S. C. App. 450(g)(2). The former (which relates exclusively to officers and employees of the Federal Government or the government of the District of Columbia) provides for reemployment after military service without time limitation; the latter has a time limit for military service, beyond which reemployment rights cease. The Comptroller General suggests the repeal of 30r(b) "thereby making the restoration benefits provided under the Universal Military Training and Service Act applicable equally to all persons leaving Federal civilian positions to enter upon active military duty."

Repeal of 5 U. S. C. 30r(b) would deprive some persons leaving Federal civilian positions to enter upon active military duty of restoration benefits they now enjoy. These are persons serving under "temporary indefinite" appointments, who are covered by 30r(b) but would not be covered by section 9(g)(2) of the Universal Military Training and Service Act, because it applies only to persons who leave "other than a temporary position."

In the postal field service, for example, it has been helpful to have the authority in 5 U. S. C. 30r(b) to restore temporary indefinite employees who were reservists or National Guardsmen after a period of active duty during such crises as Berlin and Cuba. Furthermore, we are aware of only a few cases where a reservist who could not qualify under the time limit set by the Universal Military Training and Service Act was restored under 5 U. S. C. 30r(b).

We object to the outright repeal of 5 U. S. C. 30r(b). However, we would not object to an amendment of 5 U. S. C. 30r(b) to provide a time limit equivalent to that in the Universal Military Training and Service Act if the committee finds this change desirable. * * *

The Department of Defense, by letter dated March 27, 1964, has also advised the Committee on Armed Services that outright repeal of provision 5 U. S. C. 30r(b) would not be desirable since it might result in depriving some persons leaving Federal civilan positions to enter upon active military duty of certain restoration benefits they now enjoy. Therefore, the Department recommended that if Congress sees fit to act in this area that the language of 5 U. S. C. 30r(b) be modified to provide a time limit equivalent to that contained in section 9(g)(2) of the Universal Military Training and Service Act.

The desired substitute language recommended by the Department would read as follows:

> b. Each person covered by subsection (a) of this section who is ordered to active duty, or to duty under sections 502-505 of title 32, is entitled, upon release from duty, within the time limits specified in section 459(g) of title 50, appendix to be restored to the position held by him when ordered to duty.

The Committee on Armed Services believes that the language in 5 U. S. C. 30r(b) should be amended to conform generally with the time limits on job restoration rights prescribed generally in section 9(g)(2) of the Universal Military Training and Service Act. However, since this change in title 5 is outside the jurisdiction of the Committee on Armed Services, and since the subject matter may possibly embrace considerations not brought to the attention of the Committee on Armed Services, the committee did not include in this legislation any modification to title 5. However, it recommends that the Committee on Post Office and Civil Service give appropriate consideration to the desirability of effecting this change in the law at some future date.

Cost and Budget Data

This bill would have no apparent budgetary implications.

Departmental Recommendations

This bill is a part of the legislative program of the Department of Labor. It is approved by the Department of Defense, the Civil Service Commission, the Department of Commerce, the Selective Service System, and the Office of Emergency Planning. The Bureau of the Budget advises that it interposes no objection to this legislation. The departmental letter which recommends enactment of H. R. 11509 is set out below:

U. S. DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, September 30, 1965.

HON. JOHN W. MCCORMACK,
Speaker of the House, House of Representatives,
Washington, D. C.

DEAR MR. SPEAKER: I am transmitting a draft bill to amend and clarify the reemployment provisions of the Universal Military Training and Service Act, and for other purposes. The bill is designed to improve the existing reemployment provisions of the act. The manner in which this would be achieved is discussed in further detail in the enclosed explanatory statement.

This proposal is part of the legislative program of the Department of Labor, and we have been advised by the Bureau of the Budget that there is no objection to this submission from the standpoint of the administration's program.

Sincerely,

W. WILLARD WIRTZ, *Secretary of Labor.*

Committee Recommendations

A quorum being present, the Committee on Armed Services unanimously reports H. R. 11509 without amendment and recommends its enactment.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-757

CUMMINS ENGINE COMPANY, INC.,
Petitioner,

vs.

ALAN CARNEY,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MARTIN J. KLAPER,
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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Cummins Engine Company, Inc., would respectfully note that since the filing on November 13, 1979, of its Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit there has arisen a conflict among the United States Courts of Appeals on the issue raised in the Petition. Specifically, petitioner would point out that on January 24, 1980, the United States Court of Appeals for the Sixth Circuit issued its decision in *Monroe* v. *Standard Oil Company,* No. 78-3233, ... F. 2d, ... (6th Cir. 1980), reproduced in the Supplemental Appendix hereto (S. A. 1-S. A. 11), which decision conflicts with the decision of the Seventh Circuit in this cause and with that of the Fifth Circuit,

on almost identical facts, in *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir., 1980). In fact, the Sixth Circuit specifically noted its conflict with *West, supra.* (S. A. 10).

In *Monroe,* the Sixth Circuit held that the scope of a reservist's rights is defined by an applicable collective bargaining agreement and the employer's practices. The Sixth Circuit held that § 2021(b)(3) did not create new rights or require affirmative action to protect reservists from losing benefits due to their absences so long as they received equal treatment. In short, the Sixth Circuit held that § 2021(b)(3) is not violated so long as a reservist or national guardsman is treated the same as other employees. *Monroe, supra.* (S. A. 9).

The Sixth Circuit's holding in *Monroe* is in direct conflict with the holding of the Seventh Circuit in this cause. The Seventh Circuit found that § 2021(b)(3) creates for reservists the right to be allowed to make up overtime opportunities missed and that it is "immaterial that non-military employees of defendant on leave of absence would not be entitled to overtime opportunities. . . ." *Carney* v. *Cummins,* 602 F. 2d 763 (7th Cir., 1979) (A6). This holding directly conflicts with the holding in *Monroe* wherein § 2021(b)(3) was found to create no new rights for reservists but merely to assure them equal and non-discriminatory treatment. The conflict between *Monroe* and the decision of the Court below is all the more apparent when the decision below is closely examined.

The Court below held that equal treatment under the collective bargaining agreement was insufficient with respect to Carney's right to make up missed overtime opportunities. In other words, even though Carney was treated just like any other employee and accorded equal treatment—the test for determining legality as set forth by the Sixth Circuit in *Monroe, supra*—the Court below held that equal treatment was insufficient and proceeded to imply, under an unarticulated theory of affirmative action (ftnt. 3, A6), a statutory right to make up the missed opportunities irrespective of the collective bargaining agreement.

After reasoning that the right to make up overtime was guaranteed to Carney by statute rather than contract, the Seventh Circuit went on to reason that the contractual provision inserted at the request of the U. S. Department of Labor (P5, Res. Br. 3) could not be given effect. This contractual provision granted to reservists the right to make up overtime opportunities missed while on reserve duty—a right not given to any other class of employees and, therefore, not required by *Monroe.* However, the provision allowed make up of the missed opportunities only so long as the reservist remained in the department where they arose. If, as in this case, the reservist transferred departments before making up those opportunities he lost the right to make up the opportunities and was returned to his position of equality with all other employees. The Seventh Circuit refused to give effect to this provision on the basis that the right to make up the missed opportunities was statutory and therefore not subject to forfeiture when respondent transferred departments. (A4).

After holding that the statutory right to make up missed opportunities was not subject to forfeiture, the Court below then sanctioned less than equal treatment of reservists under the collective bargaining agreement *because of their reserve status.* It held that reservists, unlike all other employees, need not be paid for such nonforfeitable opportunities upon transfer notwithstanding the fact that the collective bargaining agreement requires that *all* opportunities not subject to forfeiture be paid upon transfer. (A7). That is, having first ruled that equal treatment for reservists regarding accumulation of missed overtime opportunities is not sufficient and affirmative action or more favorable treatment is required by statute, the Court below turned around to declare that reservists are employees not entitled to the protection of a contract clause requiring that all employees be paid upon transfer for accumulated non-forfeitable missed overtime opportunities. Such a result is not only in conflict with the *Monroe* Court's mandate of equal treatment but also is incongruous.

While the Sixth Circuit in *Monroe* clearly condemned the rationale of the Seventh Circuit below (S. A. 8-S. A. 9, S. A. 10) it made reference to its ability to reach the same result. (S. A. 10). However, it is clear such reference was made because the Sixth Circuit incorrectly assumed that other employees of Cummins had the right to make up missed overtime opportunities and were paid for such opportunities upon transfer. (S. A. 11). Because it did not have the record in the Seventh Circuit before it, the *Monroe* court overlooked the fact that the contract provision in question, adopted at the request of the Department of Labor, was not discriminatory but was adopted to give reservists an advantage not afforded other employees. The *Monroe* court's statement that it could reach the same *result* as the Court below arises from its failure to recognize that the other employees did not have the right to make up missed opportunities. When this is recognized, the application of *Monroe* to the facts in this case would mandate the reversal of the judgment of the District Court.

The Seventh Circuit held below that the right it found to make up the missed overtime opportunities was statutory rather than contractual precisely because the contractual modification gave reservists the right to make up missed overtime opportunities only as long as the reservist remained in that department. If the reservist transferred departments, any opportunities not previously made up were lost. This loss upon transfer did not discriminate against reservists in a fashion condemned by *Monroe* because no other class of employees had the initial right to make up missed opportunities. Providing a right to reservists not given to any other employees does not constitute discrimination *against* reservists merely because the right is conditioned and the condition in fact occurs. The fact remains that no other class of employees had that right, whether or not the condition occurred, and reservists were thus treated better and not worse than or equal to other employees. It was for this reason the Court below had to find the right to make up missed

overtime opportunities to be statutory rather than contractual—a finding clearly condemned in *Monroe, supra.* (S. A. 8-S. A. 9). The actual conflict between the decision below and that of the Sixth Circuit in *Monroe* v. *Standard Oil Co.* justifies the grant of a writ of certiorari to review the judgment below.

CONCLUSION

For the reasons set forth herein and previously set forth in the Petition For A Writ Of Certiorari: the petitioner requests the issuance of a writ of certiorari to review the judgment and opinion below.

Petitioner would further respectfully request that consideration of the petition in this cause be postponed pending the filing of any Petition for Certiorari by the Solicitor General of the United States in *Monroe* v. *Standard Oil Company* and that the petition herein be considered contemporaneously with any petition filed in *Monroe* v. *Standard Oil Company.*

Respectfully submitted,

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APPENDIX.

No. 78-3233

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ROGER D. MONROE,
Plaintiff-Appellee,
vs.
THE STANDARD OIL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed January 24, 1980.

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal by the defendant-appellant, The Standard Oil Company (Sohio), from a summary judgment of the district court granting plaintiff-appellee recovery of wages for time spent attending military reserve meetings during his regularly scheduled work hours.[1] Recovery was predicated on 38 U. S. C. § 2022 and § 2021 (b)(3) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

1. The district court opinion is reported at 446 F. Supp. 616 (N. D. Ohio 1975).

The case was submitted to the trial judge by counsel for the parties on a stipulation of facts.

During the years 1975 and 1976, the years in which Sohio allegedly violated the Act, plaintiff-appellee, Roger D. Monroe was a full-time employee of Sohio at its Lima, Ohio, refinery. He was also a member of a unit of the Army Reserve and was required to train with his unit on the third weekend of each month and during the last two weeks of August each year.

Throughout the two years in question, Sohio operated its Lima refinery twenty-four hours per day, seven days per week. The work day was divided into three eight-hour shifts. Sohio rotated its employees' shifts. All employees were scheduled to work five eight-hour days in a row per week, but with a different five-day sequence each week. Under this system, weekend work was distributed equally among employees in the course of a year.

Appellant scheduled Monroe to work a full forty hours each week. Sohio periodically slated appellee to work Saturdays and/or Sundays just as it did Monroe's fellow employees. Except for normal time off and the absences for inactive military reserve training in issue here, plaintiff customarily worked his scheduled forty-hour weeks with occasional overtime.

Employment at the Lima refinery was governed by a collective bargaining agreement between appellant and the Ohio Chemical and Atomic Workers International Union during the pertinent period. Article V, ¶ 23 of that agreement provided:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

On four occasions during 1975 and 1976, Monroe was able to change shifts with his fellow employees to accommodate his

reserve training and still work a forty-hour week. On twenty-four other days when he was required to train, however, appellee was unable to arrange for an exchange of shifts with other employees. As a result of his absence from the refinery on these days, appellee lost a total of 192 hours of work for which he was not compensated.

Sohio took no steps to provide Monroe with substituted hours or to make up for appellee's lost working time, other than as provided by Article V, ¶ 23 of the collective bargaining agreement. In this regard, Monroe was treated the same as all other Sohio employees under the agreement.

Monroe brought this action against Sohio pursuant to 38 U. S. C. § 2022, asserting that Sohio had violated §§ 2021(b)(3) and 2024(d) of the Act by refusing to rearrange his work schedule to allow him to work a full forty hours per week during those weeks when his military reserve obligation otherwise precluded him from working a full forty hours.

The cause was submitted on the parties' cross-motions for summary judgment. The district court deemed the issue to be whether plaintiff was denied "an incident or advantage of employment," 38 U. S. C. § 2021(b)(3), "when he was unable to exchange shifts with another employee and therefore was unable to work a full forty hour week as employees without military obligations would." The court determined *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio, 1975), *appeal dismissed*, No. 75-2324 (6th Cir. January 21, 1976), to be dispositive of the issue. Sustaining plaintiff's cross-motion for summary judgment, the district court held that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" and awarded plaintiff $1,086.72 for wages lost on those 'workdates when an accommodation should have been made.' This appeal followed.

Appellant contends that it is under no obligation to schedule plaintiff additional working hours or pay him for hours not

worked. Sohio further claims that any obligation it owed Monroe was satisfied when it scheduled him to work forty hours per week and granted him the right to switch hours with other employees. We agree.

We begin by looking at two sections of the Act, both of which govern reemployment rights of reservists.

Title 38 U. S. C. § 2024(d) provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty for training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty for training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

Originally enacted in 1960 as 50 U. S. C. § 459g(4), section 2024(d) extended, for the first time, the rights set forth therein to reservists "who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training periods. . . . S. Rep. No. 1672, 86th Cong., 2d Sess. 2, *reprinted in* (1960) U. S. Code Cong. & Ad. News 3077, 3078.

Section 2024(d) guarantees terms and conditions of reemployment to reservists returning from inactive duty training. It does not, however, protect reservists from discrimination by their employers between training assignments. In the years following the enactment of § 2024(d), discriminatory employment practices intensified. Congress responded by passing what is now 38 U. S. C. § 2021(b)(3)[2] to remedy this problem. Title 38 U. S. C. § 2021(b)(3) reads in pertinent part:

> Any person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces.

2. Formerly, 50 U. S. C. § 459(c)(3).

The problem to be addressed under this statute and the nature of the remedy it was to provide were stated in a report of the Senate Armed Forces Committee. In Senate Report No. 1477, it said:

> Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions . . . or discharged because of [their training obligations]. [Section 2021(b)(3)] is intended to protect members of the Reserve . . . from such practices. It provides that these reservists will be entitled to the *same treatment afforded heir coworkers* not having such military obligations . . . . [emphasis added] S. Rep. No. 1477, 90th Cong., 2d Sess, *reprinted in* (1968) U. S. Code Cong. & Ad. News 3421, 3421.

Lott v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N. D. Ohio 1975), *appeal dismissed* No. 75-2324 (6th Cir. January 21, 1976), relied on by the district court, was one of the first cases to interpret section 2021(b)(3). In *Lott*, the court held that the opportunity to work overtime hours qualifies as an incident or advantage of employment protected by section 2021(b)(3), and ruled that a reservist may not be charged for overtime hours that he is forced to refuse because of his military training obligations.

The union contract that controlled overtime scheduling in *Lott, supra,* provided that an employee could refuse offered overtime, but he would be "charged" as if he had worked the scheduled overtime, even if his nonacceptance was due to reasons beyond his control, such as sickness or personal business. The plaintiff in *Lott* missed overtime opportunities on two occasions because of his required attendance at reserve meetings. He was charged for the overtime refused in accordance with the collective bargaining agreement. The *Lott* court rejected the

employer's argument that since the contract was neutral on its face and was applied neutrally by the defendant, plaintiff was being treated equally with his co-workers as required by section 2021(b)(3). The court reasoned that to permit the application of the contract provision with equal force to all employees, including military reservists, "would permit a collective bargaining agreement to nullify the express protections of section [2021(b)(3)]." 395 F. Supp. at 869-870. Finding that the defendant's nonreservist employees were charged only if they "voluntarily" refused overtime, the district court held that the employer was required to accommodate the plaintiff by making missed overtime opportunities available to him.

Based on its reading of the *Lott, supra,* decision, the district court in the present case had "no trouble in holding that being scheduled for a full forty hour week . . . constitutes an incident or advantage of employment" and finding Sohio liable to the plaintiff "for those work dates when an accommodation should have been made." Explaining its holding, the court stated that section 2021(b)(3) "does not mandate that all employees be treated neutrally or equally. It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations. . . ." We disagree.

We do not dispute the district court's holding that plaintiff had a right to be scheduled to work forty hours a week and that this right is an incident or advantage of employment within the meaning of section 2021(b)(3). We reject, however, the district court's conclusion that section 2021(b)(3) imposes upon an employer the affirmative duty to accommodate employees with military reserve obligations by bestowing upon them rights and privileges not generally accorded to their fellow employees.

As a starting point in our analysis, we note that we are required "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for

the benefit of a veteran as a harmonious interplay of the separate provisions permit." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285 (1948). Title 38 U. S. C. §§ 2024(d) and 2021(b)(3) are complementary and must be read together to understand the breadth of and limits to reemployment rights granted to reservists.

Section 2024(d) creates special rights for reservists. It compels employers to grant leaves of absence to employees who must attend reserve training. In addition, Section 2024(d) entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, "which automatically would have accrued to him if he had remained in the continuous service of his employer." *Aiello* v. *Detroit Free Press, Inc.*, 570 F. 2d 145, 148 (6th Cir. 1978). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. *Id.* at 145. *See also, Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975). Thus, it is clear that section 2024(d) does not require employers to pay absent reservists for hours not worked.

Section 2021(b)(3), on the other hand, does not enumerate the incidents or advantages of employment that it safeguards. The protection afforded by this section is purely derivative. It is intentionally framed in general terms to encompass the potentially limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns. But, just as the property rights protected by the Due Process Clause of the Fourteenth Amendment can only be ascertained by looking outside the Amendment to state law, we read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer's business establishment.

In the case at bar, two incidents or advantages of employment were established: the right to be scheduled for a full forty-hour

workweek and the right to exchange shifts with other employees if mutually agreeable to the employees involved and approved by the shift foreman. The record does not reveal whether the right to be scheduled for a forty-hour workweek was guaranteed by the collective bargaining agreement. The parties stipulated, however, that all employees, including the appellee, were customarily scheduled for that number of hours. We believe this to be sufficient to establish an employment practice as an incident or advantage of employment. The right to exchange shifts was provided for under the terms of union contract then in effect. Unquestionably, this right qualifies for section 2021(b)(3) protection as well.

There was no unconditional right to work forty hours a week at defendant's refinery. The right to work forty hours was contingent upon the employees' presence and ability to perform at their regularly scheduled work periods, or, in the alternative, upon successfully arranging to change scheduled working time with other employees. Thus, unless the appellee was denied the right to be scheduled for forty hours a week or denied the right to exchange shifts "because of any obligation as a member of a reserve component of the Armed Forces," § 2021(b)(3), *supra,* no violation of section 2021(b)(3) occurred.

Section 2021(b)(3) provides that incidents or advantages of employment may not be "denied . . . because of any [military obligation]." This clause is subject to two interpretations in cases such as this. First, it can be read to mean that any time an employee's forced absence for reserve duty requires him to forgo a benefit that would have accrued to him only if he had been present for work, he has been "denied" an incident or advantage of employment "because of" his military obligation. This is the interpretation subscribed to by the court in the instant case and the court in *Lott* v. *Goodyear Aerospace Corp., supra,* 395 F. Supp. 866. Under this view, employers have a duty to alter their employment rules, which may necessitate the fashioning of exclusive preferential rights, to accommodate reservist-

employees' military training obligations. An employer must shoulder this burden even though the detriment to the reservist is a direct consequence of his military undertaking and not the result of intentional unequal treatment by his employer. We believe such an interpretation ignores the legislative history of the Act and requires a tortured reading of section 2021(b)(3).

The legislative history clearly states that section 2021(b)(3) is aimed at combatting discriminatory practices of employers. To this end, section 2021(b)(3) was enacted to ensure that reservists would be "entitled to the same treatment afforded their coworkers not having such military obligations." S. Rep. No. 1477, *supra,* at 3421. We find no support in the legislative history of this section for the view that reservists are to receive preferential treatment; only that they must not be subjected to on-the-job bias by their employers because of their prospective military obligations.

In the absence of a clear and unambiguous statutory mandate to the contrary, we hold that section 2021(b)(3) merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations. To meet this requirement, collective bargaining agreements and employment rules must be facially neutral and must be applied uniformly and equally to all employees.

The requirement of equal treatment was met in the present case. The parties agreed that appellee was regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees.

The condition precedent to plaintiff's right to work forty hours, as opposed to being scheduled to work forty hours, was

never satisfied. The right to work forty hours was contingent on appellee's being present for work or arranging to switch shifts. On twenty-four occasions, appellant was unable to do either. His inability to exchange shifts was not due to unequal treatment by the appellant but attributable to the lack of co-operation on the part of his fellow employees. Nor were Monroe's absences on these occasions the result of disparate employment practices designed to deny appellee the right to be present for work because of his status as a member of the military reserve. Monroe was absent because he had to attend reserve training. Appellant was required to grant appellee a leave of absence on these days, and it did. It was not required to do more. Thus, the right to work forty hours during the weeks in question did not vest. Since there was no right to work forty hours during these weeks, there was no incident or advantage of employement protected by § 2021(b)(3) that was "denied . . . because of any obligation as a member of a reserve component of the Armed Forces." Sec. 2021(b)(3), *supra. West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir., 1980), involved a suit similar to the case at bar. There, the collective bargaining agreement guaranteed employees the right to work forty hours a week conditioned upon their pressence at work. Interpreting § 2021(b)(3) to require that such agreements be construed as if an absent employee is "constructively present" on those days he has reserve training, the Fifth Circuit held that the employer was required to accommodate the plaintiff by rescheduling him during those weeks when he was absent for reserve duty. We find nothing in the legislative history or the statute to support judicial invalidation of nondiscriminatory conditions precedent to employee benefits and adhere to our belief that conditional benefits are protected by § 2021(b)(3) only to the extent that the conditions have been actually satisfied.

We believe the result reached in *Carney* v. *Cummins Engine Co., Inc.*, 602 F. 2d 763 (7th Cir. 1979), is consonate with the result here, though we choose not to adopt fully that court's

rationale. In *Carney*, the Court of Appeals for the Seventh Circuit affirmed a district court judgment that a collective bargaining agreement suspending the right of reservists to be paid for accrued overtime when transferring departments was violative of section 2021(b)(3), where other employees were not denied this benefit upon transfer. We agree with the court that the collective bargaining agreement was no defense in that instance, since the contract provision at issue clearly discriminated against reservists. We decline to adopt the courts further reason for affirmance, however, insofar as the court appears to hold that the right to overtime opportunities is conferred by statute rather than by employment contract or practices.

For the foregoing reasons, we reverse the judgment of the District Court and remand the case with instructions to dismiss the complaint.

No. 79-757

In the Supreme Court of the United States

OCTOBER TERM, 1979

CUMMINS ENGINE COMPANY, INC., PETITIONER

v.

ALAN CARNEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 602 F. 2d 763. The opinion of the district court (Pet. App. A8-A14) is reported at 84 Lab. Cas. para. 10,856, and 99 LRRM 2683.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1979. A petition for rehearing was denied on August 16, 1979. The petition for a writ of certiorari was filed on November 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner violated the Veterans' Reemployment Rights Act, 38 U.S.C. 2021(b)(3), in refusing to permit respondent to make up overtime opportunities he had missed while serving on military reserve duty.

2. Whether an order pursuant to the Veterans' Reemployment Rights Act compensating a reservist for denial of his rights under that statute is an unconstitutional taking without just compensation.

STATUTES INVOLVED

The Veterans' Reemployment Rights Act provides in pertinent part:

38 U.S.C. 2021(b)(3)

Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

38 U.S.C. 2024(d)

Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident

to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.* * *

STATEMENT

At all times relevant to this action, respondent was a member of the Indiana National Guard and was employed by petitioner under the terms of a collective bargaining agreement with the Diesel Workers' Union (Pet. App. A2-A3). This agreement provided that overtime opportunities would be distributed equally among employees available to perform the work. Any errors in assigning the work, either conscious or inadvertent, were to be corrected within 30 days of being brought to petitioner's attention (*id.* at A2). If the error was not corrected within 30 days, or if the affected employee transferred to another department before making up all of the overtime to which he was entitled, petitioner was bound to pay the employee for the missed overtime (*ibid.*). If an employee refused proffered overtime work or was absent (even for military obligations) when the opportunity arose, he was charged in the company records for these purposes as if he had worked the overtime (*ibid.*).

Petitioner was notified by the Department of Labor in July 1975 that certain features of this system violated the Veterans' Reemployment Rights Act, 38 U.S.C. 2021 *et seq.* (Pet. App. A2). In response to this notice, petitioner's officers and union representatives agreed to alter the procedure so that reservists would not be charged with missed overtime opportunities when they were absent for military reasons (*id.* at A2-A3). However, the modification also provided that petitioner

would not be liable to pay reservists for missed opportunities that were not offered within 30 days or not made up before transfer to another department (*id.* at A3).

While attending summer camp training with the National Guard in July 1975, respondent missed the opportunity to work 11 overtime hours (Pet. App. A3). He was allowed to make up three of these hours but was transferred to another department on September 2, 1975, before being permitted to make up the remaining eight hours (*id.* at A3-A4). Petitioner refused to pay respondent for the lost overtime or to allow him an opportunity to make up the time.

Respondent brought suit in the United States District Court for the Southern District of Indiana to compel petitioner to permit him to make up the missed overtime.[1] On cross-motions for summary judgment, the district court ruled in respondent's favor and ordered petitioner either to permit respondent to work eight hours of overtime or to pay him compensation for that time (Pet. App. A8-A15). The court of appeals affirmed (*id.* at A1-A7).

ARGUMENT

1. Petitioner concedes that the opportunity for overtime work is an "incident or advantage of employment" within the meaning of 38 U.S.C. 2021(b)(3) (Pet. App. A4), but it contends (Pet. 7-10) that application of Section 2021(b)(3) to this case conflicts with prior decisions of this Court. This contention is erroneous because, as petitioner notes (Pet. 11), this Court has

[1]Pursuant to 38 U.S.C. 2022, respondent is represented in this action by the Department of Justice.

never considered the scope of Section 2021(b)(3). We submit that there is no reason for the Court to do so here. There is no conflict in the circuits concerning the issue presented in this case,[2] and the court of appeals correctly applied Section 2021(b)(3).

Petitioner contends that Section 2024(d) should apply here to the exclusion of Section 2021(b)(3). As the court of appeals observed (Pet. App. A5), however, the history of the legislation that added Section 2021(b)(3) clearly indicates that the section was enacted because Congress was dissatisfied with the scope of the protection provided by Section 2024(d), see H.R. Rep. No. 1303, 89th Cong., 2d Sess. (1968) (reprinted at Pet. App. A67-A80), and wanted to "strengthen" the existing protections (Pet. App. A67). The House Report indicates the congressional concern that reservists were suffering from discriminatory employment practices, in spite of the existence of Section 2024(d) (Pet. App. A70). Accordingly, Section 2021(b)(3) was enacted to protect reservists from employment practices that affect them on a day-to-day basis. Contrary to petitioner's claim (Pet. 9) that Section 2021(b)(3) was meant to protect reservists only "between their reserve absences," the Report states unequivocally that the section was designed "to enable reservists and guardsmen who *leave* their jobs to perform training in the Armed Forces to retain their employment and to enjoy *all* of the employment opportunities and benefits accorded their co-workers who do not participate in the Reserve program" (Pet. App. A70; emphasis added).

[2]One of the two district court cases cited by petitioner (Pet. 11 n.7) as in conflict with the decision below has recently been reversed on appeal. *West* v. *Safeway Stores, Inc.*, 84 Lab. Cas. para. 10,905 (N.D. Tex. 1978), rev'd, 609 F. 2d 147 (5th Cir. 1980).

Thus, Section 2021(b)(3) plainly was intended to add to the protections of Section 2024(d) and to ensure that a reservist would not be disadvantaged relative to his co-workers in his daily work life, simply because he was absent from work at summer training. Section 2024(d) deals primarily with reinstatement of reservists; for example, it guarantees a reservist the right to take a leave of absence and return to his job while still having his time spent in military training count for seniority purposes. See, *e.g.*, *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977). Accordingly, the courts have generally held that Section 2021(b)(3) ensures that a reservist, as a result of fulfilling his military obligations, may not be deprived of opportunities for benefits that his co-workers receive. Such benefits include overtime opportunities (*Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975); but see *Breeding* v. *TRW, Inc., Ross Gear Division*, 477 F. Supp. 1177 (M.D. Tenn. 1979), pending on appeal, No. 79-1629 (6th Cir.)), the opportunity to work a 40-hour week (*West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir. 1980); *Monroe* v. *Standard Oil Co.*, 446 F. Supp. 616 (N.D. Ohio 1978), pending on appeal, No. 78-3233 (6th Cir.)), and holiday pay (*Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060 (S.D. Fla. 1978)); *Hanning* v. *Kaiser Aluminum and Chemical Corp.*, 82 Lab. Cas. para. 10,070 (E.D. La. 1977)). See also *Carlson* v. *New Hampshire Dept. of Safety*, No. 79-1262 (1st Cir. Nov. 30, 1979).[3]

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[3]Petitioner contends (Pet. 11-12) that the decision now before this Court, combined with the decision in *Monroe* v. *Standard Oil Co.*, *supra*, will cost employers $700 million per year because reservists will be entitled to be paid for the two weeks spent in summer reserve training. This contention is without foundation. In *Monroe*, the court specifically negated the suggestion that a reservist should be paid for his two weeks spent in summer training. 446 F. Supp. at 620. In fact, compliance with the Act here costs an employer nothing. Congress has simply required that employers make special efforts to accommodate reservists so that "their economic well being is disrupted to the minimum extent possible" (Pet. App. A71). Congress plainly recognized that not all such disruption is avoidable.

2. Petitioner's contention (Pet. 12-14) that Section 2021(b)(3), as construed by the courts below, constitutes an unconstitutional taking of property without just compensation is also insubstantial. As the court of appeals pointed out (Pet. App. A6-A7), petitioner is not compelled by the district court's order to pay respondent for not working; it was given the option of assigning respondent overtime work to make up his lost opportunities. In any event, a provision requiring an employer to compensate an employee for violation of his rights does not constitute a taking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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